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STORY'S COMMENTARIES.

How vast has been the increase of books on the study and practice of the law since the days of Lord Coke, the following extract from the preface to the third volume of his Reports may be sufficient to show:—"Right profitable are the ancient books of the common law yet extant, as Glanville, Bracton, Britton, Fleta, Ingham (Hengham), and Novæ Narrationes; and those also of later times, as the Old Tenures, Old Natura Brevium, Littleton, Doctor and Student, Perkins, Fitzherbert's Natura Brevium and Staunford. After mentioning with commendation the Abridgments of Fitzherbert and Sir Robert Brooke, as also that of Statham, the Book of Assizes, and the "great Book of Entries," and the "exquisite and elaborate commentaries of Master Plowden, the summary and fruitful observations of Sir James Dyer, and his own simple labors," the Lord Chief Justice continues: "Then have you *fifteen* books or treatises, and as many volumes of the Reports, besides the Abridgments of the common law; for I speak not of the Statutes and Acts of Parliament, whereof there be divers great volumes."

In addition to the fifteen treatises mentioned by Lord Coke, there are more than a thousand volumes of treatises on the law; of which none enjoy a higher reputation, or are more frequently cited on the Continent, in England, and in this country, than those written by Judge Story. Even Lord Coke himself, the acknowledged master of the common law, has received no higher designation on the Continent than *quidam Cocus*, a certain Coke. Judge Story's books are cited as authority in Westminster Hall,[1] a tribute of unwonted character to a foreign jurist; and Lord Denman when Chief Justice of England made the remarkable declaration, with regard to a point on which Story had differed from the Court of Queen's Bench, that his opinion would, "at least, neutralize the

[1] See the English Reports, *passim*.

effect of the English decision, and induce any of their courts to consider the question as an open one."[1] In 1843 in the House of Lords, Lord Campbell characterized him as "greater than any law-writer of which England could boast, or which she could bring forward, since the days of Blackstone;"[2] and in a letter to Judge Story, the same great authority said: "I survey with increased astonishment, your extensive, minute, exact, and familiar knowledge of English legal writers in every department of the law. A similar testimony to your juridical learning, I make no doubt, would be offered by the lawyers of France and Germany, as well as of America, and we should all concur in placing you at the head of the jurists of the present age."[3] In his Lives of the Chief Justices, the Lord Chief Justice of England speaks of him as "one of the greatest jurists of modern times." His authority was acknowledged in France and in Germany, the classic lands of jurisprudence; "nor is it too much to say," writes one of the most accomplished scholars of the present age, "that, at the moment of his death, he enjoyed a renown such as had never before been achieved, during life, by any jurist of the common law."[4] His fame is not his country's alone; it is co-extensive with the common law; it reaches every State where the Code of Justinian is known."[5]

Lord Campbell might well survey with astonishment the "knowledge of English legal writers in every department of the law," of a jurist to whom no region of English Law Literature was unfamiliar. With the fountain heads of the law—the Year Books and old Reports—he was acquainted. Though of late years less attention has been paid to the Year Books, their importance is acknowledged by eminent jurists, and Lord Chief Baron Pollock has adverted to the extent of the information derivable from them. In a letter written in 1843 to Matthew Davenport Hill, Esq. by Judge Story, occurs the following passage: "Looking to the gradual but certain decline of a knowledge of the old Norman Law French, I cannot but hope that Parliament may be induced to order a trans-

[1] Letter of Lord Denman to Hon. Charles Sumner, dated September 29, 1840. The case to which Lord Denman referred is Peters *v.* The Warren Insurance Company, 3 Sumner, 389, and 14 Peters, 111, where Mr. Justice Story dissented from the case of De Vaux *v.* Salvador, 4 Ad. & El. 420.

[2] Speech on Lord Brougham's motion of thanks to Lord Ashburton, April 7, 1843. And with reference to Bracton's treatise, Lord Campbell, in his Lives of the Chancellors, holds similar language: "It is curious that in the most disturbed period of this turbulent reign [Henry III.], there was written and given to the world the best treatise upon law of which England could boast till the publication of Blackstone's Commentaries, in the middle of the eighteenth century."

[3] Letter of Lord Campbell to Mr. Justice Story, dated September 29, 1842.

[4] Hon. Charles Sumner. Address before the Phi Beta Kappa Society of Harvard University, August 27, 1845, pamphlet ed. p. 33.

[5] 8 Law Reporter, p. 244.

lation and publication of all the Year Books (the unpublished as well as the published), as well as all the records of the early cases decided in Chancery; they would contain invaluable materials for an exact history of Common Law and of Equity which, I fear, in a few years will be wholly inacessible to the bulk of our profession."[1]

In a valuable treatise[2] published at Edinburgh in 1836 is the following passage:—"The Library of the British Museum and the Public Law Libraries in the metropolis are very defective in regard to the writings of the Foreign Jurists. Of ninety-one continental writers on the subject of the Conflict of Laws quoted, or referred to, by the American jurists, Livermore and Story, a large proportion is not to be found in these libraries; but, except six, I see them all marked in the catalogue of that admirable repertory of books of law, the 'Library of the Faculty of Advocates in Edinburgh.'"

In the beginning of the year 1832 Judge Story published the Commentaries on the Law of Bailments, which was the first textbook written by him after he was appointed Dane Professor of Law at Harvard University. Hitherto, the only English treatise on this subject had been the well known Essay of Sir William Jones, written with the characteristic elegance of language of that author, but which was a mere outline of the general principles of the law of Bailments, and was deficient both in accuracy and fulness. At the time when that treatise was written, the judgment of Lord Chief Justice Holt, in the case of *Coggs* v. *Bernard*,[3] which is one of the most celebrated ever decided in Westminster Hall, contained the first well-ordered exposition of the English common law of Bailments. But with the lapse of fifty years from that time many cases had arisen both in England and in this country, in which the principles of the law of Bailments had been greatly enlarged and modified. The want of a full and accurate treatise embodying these decisions, and reviewing and systematizing in their light the whole principles of the law applicable to this subject, was apparent. This want the Commentaries on Bailments fully supply. Reaching beyond the narrow limits of the Common Law, by copious importations from the Civil and Roman Jurisprudence, Judge Story enriched and developed this branch of the law of contracts with a fulness and accuracy it never before possessed. "I would strongly recommend that volume to the student," says Chancellor Kent, "who wishes to pursue more extensively than the plan of the present lecture permitted, the refined distinctions and prac-

[1] The correspondence between Mr. Hill and Mr. Justice Story will be found in The London Law Review, vol. iv. p. 383.

[2] Robertson on the Rules of the Law of Personal Succession in the different Parts of the Realm, p. 124.

[3] 2 Lord Raymond, 909; 1 Smith's Leading Cases, 171, 5th London ed.

tical illustrations which accompany this branch of the law. I have availed myself of the lights which that work has afforded, and the confidence which it has inspired, while engaged in the revision of my own more brief and imperfect survey of the subject. This excellent treatise is the most learned and the most complete of any that we have on the doctrine of bailment. It aims to lay down all the principles appertaining to the subject, both in the civil, the foreign, the English, and the American law, with entire accuracy; and I beg leave to say, after a thorough examination of the work, that in my humble judgment, it has succeeded to an eminent degree."[1]

In the preface to this work Judge Story remarked, in a passage which has been repeatedly reprinted in England, that the English text-writers confine themselves too closely to the technicalities of their profession. He says:—

"There is a remarkable difference, in the manner of treating juridical subjects, between the foreign and the English jurists. The former almost universally discuss every subject with an elaborate, theoretical fulness and accuracy, and ascend to the elementary principle of each particular branch of the science. The latter, with few exceptions, write Practical Treatises, which contain little more than a collection of the principles laid down in the adjudged cases, with scarcely an attempt to illustrate them by any general reasoning, or even to follow them out into collateral consequences. In short, these treatises are but little more than full Indexes to the Reports arranged under appropriate heads; and the materials are often tied together by very slender threads of connection." But in truth we can hardly be surprised at this. An English lawyer has small encouragement to write anything but a "practical treatise." That is the only kind of literature in which he can safely appear as

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[1] 2 Kent Comm. 611. We print the following extract from the preface to the London edition, 1839:—

"A short time since, having accidentally ascertained that a work on the Law of Bailments had been published in America by Dr. Story, the editor became extremely desirous to possess a copy of a book, which he anticipated, (judging by Dr. Story's other works,) he should find to be valuable. The editor made inquiries in every direction where it was deemed probable he should obtain it, but without success. It is believed that none of the libraries of our Inns of Court, nor that of the British Institution, possess a copy, and certainly no such book is contained in the Catalogue of the British Museum. Many further attempts were made to acquire this work, and in every instance the editor failed in accomplishing the object he so anxiously sought. Chance then came to his aid, and granted him that boon, which his efforts had not been able to effect. The editor was informed that a barrister, resident in the Temple, who possesses a magnificent library, had this book, it having been, it is believed, Lord Stowell's copy. The editor was accommodated with the loan of the book, and as purchasing it could not be thought of, he incurred the expense of employing an amanuensis, and thus enabled, he has enriched his own library with the desideratum. Considering the difficulty of procuring this book, it occurred to the editor that a reprint in this country, would be deemed an acceptable offering to the profession."

an author, or which gives him a chance of attaining what is supposed to be the great object of his existence—professional success. The increasing demand for the work is the best evidence of the estimation in which it is held by the profession. Six large editions have been exhausted, and the seventh was published in January last.

In the early part of the year 1833 the Commentaries on the Constitution of the United States were published, and were immediately succeeded by an Abridgment prepared as a text-book for the Law School and College. The two great sources from which he drew the greatest part of the most valuable materials for these volumes were The Federalist,[1] and the judgments of Chief Justice Marshall upon constitutional law. Not only was this work honored in this country and in England, but it was translated into French and German, and received the highest commendations from some of the most distinguished jurists on the Continent. "This great work," said Professor Greenleaf, "admirable alike for its depth of research, its spirited illustrations, and its treasures of political wisdom, has accomplished all in this department which the friends of constitutional law and liberty would desire." "This work," said Webster, than whom no one was more competent to judge, "is one of his most eminently successful efforts." In the present distracted state of the country, the solemn admonitions contained in the concluding chapter should be read with attention. It has passed through three editions, the last of which was published in 1858.

In the early part of the year 1834 the Commentaries on the Conflict of Laws were published. It was this work which put the seal to the author's reputation abroad as a jurist. The admirable method and style, the vast learning with which the principles of international jurisprudence are illustrated, the clearness and power of the legal discussions, the candor and acuteness with which conflicting opinions and doctrines are analyzed and compared, and the

[1] There is a strange mistake made by Lowndes in his Bibliographer's Manual which remains in the new edition, to which Mr. Bohn has made so many valuable additions. "The Federalist" is said to be "a collection of essays in which John Williams *alias* Anthony Pasquin was concerned." Shades of Hamilton and Monroe, founders of the Great Republic, and revered expositors of its Constitution, your noble work, which stands almost alone, as being at once an undisputed authority in politics and a classic in letters, is a series of essays in which a pasquinading *alias* "was concerned;" and this is all! Not to know who wrote "The Federalist," and what it is, and that the men who wrote it, although of what a member of Parliament, unrebuked in presence of the British Premier, calls "the scum of the earth," were yet of a sort which does not admit the companionship of the Anthony Pasquins of London, is not culpable in a British subject; the matter may be of no interest to him; but when, pretending to speak with authority, he exhibits such density of ignorance, both his ignorance and his pretence become ridiculous.—Richard Grant White in The Book Hunter, Am. ed. p. 74, note.

comprehensive generalizations by which they are systematized, justly entitle it to be considered as one of the most remarkable of his treatises. As it was the first systematic development of the subject in the English language, so in its department it still stands alone. "No work on national jurisprudence," as was said in the London Law Review, "merited or ever received greater praise from the jurists of Europe." A writer in the English Jurist, speaking of it, says: "It is absolutely refreshing to sit down to the task of commenting on a work such as that before us, of which we may commence by saying, that if the subject-matter is vast, the arrangement is philosophical and lucid, and the style is almost classical;" and the Edinburgh Law Journal speaks of it as a "work altogether of so excellent a description, and betokening a mind so completely imbued with the purest principles of legal philosophy, that it ought to be in the hands of every person who aims at studying, in an intelligent way, the higher departments of professional knowledge." It was reprinted at once in England, and but a short time elapsed before it was translated and published in France and Germany. Chancellor Kent in his Commentaries says, "there is no treatise extant on the subject of Conflict of Laws, so accurate, full, and complete."[1] The fifth edition of over one thousand pages was published in 1857.

In 1836 the Commentaries on Equity Jurisprudence were published. They are remarkable for their admirable arrangement, lucid exposition of principles, their richness of illustration, and the comprehensive spirit in which they are written. "In this work," to use the language of the London Law Magazine, "the history of Equity Jurisdiction is stated, the principles are developed upon which it is maintained, and the entire equitable system assumes a philosophical character, with which it never had been invested by any preceding author." It performs for Equity the same service that Blackstone's Commentaries performed for the Common Law, giving it for the first time completeness of outline and binding the various scattered doctrines into one capacious form. "This is one of the best," says the American Law Magazine,[2] "if not the best of the books published by its learned author. It may be said to be the most complete treatise on the subject, systematically arranged, treating upon almost every point that has arisen, or may arise, and especially rich and delightful in its references to, and illustrations drawn from, the Civil Law." The eighth edition, thoroughly revised and greatly enlarged by Judge Redfield, was published in 1861.

In the beginning of the year 1838 the Commentaries on Equity Pleadings was published. Of this work, Prof. Greenleaf says, that the subject which it treats, "however abstruse and forbidding

[1] Vol. ii. p. 463.

[2] Vol. i. p. 448, July, 1843.

in its formularies, he has most successfully laid open, exhibiting its true principles and grounds, vindicating its character, and bringing it within the easy comprehension of the student. There are no works in our language in which the true doctrines and practice of the Law of Equity, and its importance to the administration of complete justice, are so convincingly taught; and probably no one of his works has been received by the profession with greater thankfulness, or is more frequently consulted." We print the following extract from the last section in the volume: "He, who has attained a thorough knowledge of Equity Pleadings, cannot fail to have become a great Equity Lawyer. He need not shrink from the most difficult and complicated engagements of his profession. Nay, he will find, that while many others are willing to rely on their own genius, with a rash and delusive self-complacency, to carry them through the intricacies of a controverted suit, he may far more justly and safely repose on a solid learning, which will secure respect, and a tried and varied discipline, which will command confidence. To no human science better than to the Law, can be applied the precepts of sacred wisdom in regard to zeal and constancy in the search for truth. Here the race may be to the swift; but assuredly the battle will be to the strong." The sixth edition was published in 1857.

In 1839 the Commentaries on Agency were published. The American Jurist, for January, 1840, speaks of it as having "supplied every deficiency, and left nothing to be desired by the practitioner or student. . . . The whole work is marked with that ample and redundant learning, and vigorous good sense which have given his previous writings so high an authority, both in England and America." The London Law Magazine, for February, 1840, in a review of the work, says: "The powerful assistance which Mr. Justice Story has already given in the study of several departments of Law and Jurisprudence, is a sufficient reason for drawing the attention of our readers to this new publication; but an additional motive, were any needed, would be supplied by the spirit in which all his publications are conceived. . . He has entered philosophically into the subject, has traced principles with persevering scrutiny, and without losing sight of the wants of a practical lawyer, has produced a treatise in which the student may ascertain the elements and principles on which the entire doctrine is founded." The following is the conclusion of the last section:—"It is, indeed, to be numbered among the proudest achievements of England that, while the peculiar doctrines of her own common law have been cultivated and illustrated by her lawyers and administered by her Judges, with a sagacity and learning and ability rarely equalled and never excelled, Westminster Hall has promulgated the more enlarged and liberal principles of her commercial jurisprudence with a practical wisdom and

enlightened policy, which have commanded the respect of the world, and silently obtained for it an authority and influence, more enviable and extensive even than those acquired by her arts or her arms." The sixth edition was published in 1863.

In the early part of the year 1841 the Commentaries on Partnership were issued from the press. The exposition of this subject, which is noted for its intricacy, is very luminous, and the subtile distinctions and principles by which it is governed are developed with great clearness and learning. The fifth edition was published in 1859.

Early in the year 1843 the Commentaries on Bills of Exchange was published. In the treatment of this work the author adopted a new plan of writing a distinct treatise on Bills of Exchange, instead of confusing it with the doctrines applicable to Promissory Notes, as had previously been done in the principal works on this subject. The reasons which induced him to adopt this plan are very satisfactorily stated in the preface. This work was at once translated into German. Chancellor Kent, in his Commentaries,[1] speaks of it as "the most elaborate and complete treatise extant on the elementary principles of the subject. It is full and methodical, and executed with his masterly ability;" and the *Revue Etrangère*, speaking of it, says: "This work has been considered, both in the United States, England, and Germany, as one of the most important which have appeared on the subject. Mr. Story has explained, in a clear and precise manner, the developments which have taken place in the law of Bills of Exchange, and on every point he has given distinct principles, drawn from the nature of life and the necessities of trade. His eminently practical tact has enabled him to lay his finger upon the essential points." The fourth edition was published in 1860.

In 1845 the Commentaries on Promissory Notes was published. It is decidedly the best book on this subject. It is learned, philosophical, clear and complete. The most important cases are collected, and the principles on which they stand carefully examined and defined. We always have been fully convinced of the great utility and importance, in a practical view, of separating the doctrines respecting Bills of Exchange from those which belong to Promissory Notes. The advantages arising from this plan are obvious. The reader will find them convincingly stated in the preface. The fifth edition was published in 1859.

Of these works, we cannot but think that the treatise on Bailments is entitled to the highest praise. It exhausts not only the English and American doctrine, but the Roman and Continental law has been laid under contribution, to enlarge and build up the nar-

[1] Vol. iii. p. 127.

row, shambling structure of the common law into a full and admirable system. It has more the merit of creation, than any book, except that on the Conflict of Laws.

To the Commentaries on the Conflict of Laws has been generally accorded the praise of being his best work. It is, indeed, more original in its plan and scope, more imposing in its array of learning, and more recondite and universal. Its European reputation above his other books, may, perhaps, be accounted for in measure, by the fact, that it is not limited in its subjects to the common law of England and America, but is cosmopolitan. Able as it is, it may be questioned, whether it is more valuable or better written, than the Commentaries on Equity. The richness and variety of learning which distinguish the latter work, the clearness of its doctrines, its admirable method and development of its subjects, certainly entitle it to a place very near, if not beside, that on the Conflict of Laws. It has done more to reduce Equity to a science, than any treatise on the subject; and, in fact, it is the first which contains a logical and systematic treatment of the complicated doctrines of Chancery Jurisprudence. It involved vast labor and learning, and its execution is as successful, as it was difficult. Its value can be readily estimated, by considering how great a void its obliteration would make.

Judge Story's Commentaries are works so clear in style, so lucid in arrangement, so comprehensive in learning, and so satisfactory in their results, that they will not soon be superseded, or even equalled. That they are faultless either in style or matter we do not pretend. But if the rude hands of some Khalif Omar should destroy them, we know of no writer who could successfully reconstruct them. An indefinite reward might safely be offered for their restitution.

MAY'S CONSTITUTIONAL HISTORY OF ENGLAND.[1]

ALTHOUGH protests of the strongest nature have been entered against the introduction of the principle of the division of labor into history, the practice, we fear, has become so inveterate, and the advantages which attend it, under existing circumstances, are so unquestionable, that it seems best to submit to it with as good a grace as possible. Indeed, considering the fulness of research and minuteness of inquiry which the character of the present age ren-

[1] The Constitutional History of England since the Accession of George the Third, 1760–1860. By Thomas Erskine May, C. B. In two Volumes. Vol. II. London, 1863. [From the Law Magazine and Law Review, May, 1863.

ders necessary in all historical compositions of a more ambitious order, we see no likelihood of any work which shall be the History of England being produced in our day, or even in that of our immediate descendants. Not only with respect to those periods of history of which most has been written, does much remain in obscurity—many incidents and circumstances being inadequately known, and the relations of many events to each other imperfectly understood—but much, also, remains to be done with respect to those earlier periods which used scarcely to be considered as coming within the domain of history, while antiquarian research and the science of languages have shed light, obscure but startling, even on confessedly pre-historic times. Bearing, as this latter inquiry does, on the origin and migration of races, it is impossible to dismiss it as irrelevant, when we have to deal with the history of a composite people such as that which inhabits these islands; and, at all events, until it has been pursued further than it has hitherto been, it will be impossible to pronounce how much or how little it may affect what is known as the History of England. But even without stretching the province of history beyond its received boundaries, it is quite clear that the different divisions and branches of our history must be pursued separately for a long time to come, and that it will only be after much labor has been undergone in each department, and with reference to each period, that the materials of a work such as all must desire will be fully prepared. Then only, if even then, will it be possible for some transcendent genius to bind the various sections in one *fasciculus*, and to present to the world a History of England which shall indeed be "a possession forever."

Meanwhile, whatever industry may be bestowed on special subjects connected with our history, there are approximations to such a result. No one now thinks of writing the political history of any period without reference to its religious, intellectual, and social condition. The ecclesiastical historian no longer ventures to shut his eyes to those mundane influences, which modify so powerfully, though often unconsciously, all the opinions and all the practices of men. The days have gone by when it was possible for an author to write the life of Bacon the Lord Chancellor, while ignoring Bacon the philosopher.

Constitutional history, especially that of England, throws its branches out widely, and covers a large portion of the field of general history. It connects itself with the revolutions of race, of thought, and of manners, as well as with those of government. Each step in the progress of our constitution is marked by great changes in society, both precedent and subsequent, nearer or more remote. The battle-field, the council board, the debates of parliament, the judgments of courts of law, the pulpit, the press, the coffee-house, and the club, afford materials for the records of the

constitutional historian of England. A mere statement of the law, as it was gradually developed, however accurate and comprehensive, would most inadequately represent the real history of our constitution. It is but a small portion of the constitution of this country which is to be gathered from Acts of Parliament and the Reports—from our statute and common law. Its predominating principles are to be found in those sentiments which are engraved deep on the hearts of Englishmen, and which the events of a long and eventful history have contributed to form.

It is obvious, from these considerations, that no department of English history possesses a higher importance or deeper interest than that which is termed constitutional history. No names call forth a prouder feeling in the breasts of Englishmen than those which belong to it; no events have so powerfully affected all our habits and feelings as those which it records. Hallam's great work, it must be admitted, has never been popular, but this arises not from the subject, but from his mode of treating it. No man was better fitted, in many respects, to undertake such a subject. His comprehensive and inquiring mind, his clear perception of the real point of every question, and his admirable skill in weighing opposing views, and striking a balance between conflicting parties, were rare qualifications for such a task. But these qualities in him, from not being properly tempered by others no less important, were apt to assume the appearance of rigidity and severity. He would not admit into history the principle of set-off, without which, we humbly think, justice can never be done either to individuals or to parties. His iconoclasm was too unsparing—not merely viewed with reference to popular feeling, but on a fair philosophical estimate.

We have no intention of comparing Mr. May as a constitutional historian with Hallam; but in some respects, unquestionably, he has the advantage of the latter, and we shall certainly be surprised if his work does not enjoy a larger amount of popularity than that of which it is the supplement. While perfectly fair and impartial in his statements and estimates, and while arriving at his conclusion with sufficient deliberation, he yet pronounces with firm decision in favor of liberty and progress, and of those by whom they were supported during the period which his work embraces. His views are not extreme, but they are unmistakable; they are unwavering, and, we venture to think, they are unassailable. They are the views which commend themselves to every man who studies the history of this country, from the commencement of the reign of George III. to the present time, without prejudice or partiality. They are the views which our present experience shows to be sound and wise; and they are the views which we are persuaded will be ratified by the judgment of posterity.

In a recent number of this Journal,[1] we introduced to the notice of our readers the first volume of Mr. May's work, and we then expressed our high opinion of the manner in which he had accomplished that portion of his task. In the volume to which we refer he had treated of the influence and revenues of the crown, the House of Lords, the House of Commons, and the relations of parliament to the crown, the law, and the people. In the present volume, which completes the work, he discusses party, the press and liberty of opinion, the liberty of the subject, the church and religious liberty, local government, Ireland before the Union, British colonies and dependencies, and the progress of general legislation. It is obvious enough, from the above enumeration, that the author has omitted nothing which could fairly be considered as directly connected with the subject of which he treats, while under each head will be found the utmost fulness of detail, without the slightest tendency to prolixity. No undue prominence is given to subjects which are of inferior interest, and no question of essential importance has been lightly passed over. The work is obviously the production not merely of a well informed and painstaking author, but of a man of sound and practical judgment; of one who has not only a thorough knowledge of the history of the period which he discusses, but an intimate acquaintance with the present state of public opinion, and with the relations of existing statesmen and parties. If Gibbon owed part of his success, as the historian of the Decline and Fall of the Roman Empire, to the observations which he had made as a member of the House of Commons, we cannot doubt that Mr. May's official position has been of incalculable advantage to him, in treating a subject which, in all its branches, is more or less directly connected with the House of which he is so important and so efficient an officer.

The subjects which occupy the present volume possess, in some respects, even a higher interest than those to which the former was devoted, because they touch more directly the happiness and prosperity of the community at large, and the practical working of the constitutional system under which we live. The limits of the prerogative, the law relating to impeachment, and the right of stopping the supplies, are fortunately at the present day subjects of little more than theoretical interest; but the freedom of the press, religious liberty, and the progress of general legislature, are matters with which we have all more or less to do, and of which the present state cannot be separated from the past history. Even with respect to party, modified and subdued as that great institution now is, it cannot be said that it belongs to a former state of things, and has been finally disposed of. Much as party has been abused by un-

[1] November 1861.

scrupulous men, and much as its evils have been deplored by wise and good men, its existence forms one of the necessary conditions of sound constitutional government. In its general results on the progress of the constitution there is no serious ground for complaint, unless on the supposition that, without party, men would all have been enlightened, patriotic, and disinterested. But taking men as they are, the best prospect of sound government arises, when no principle can be pushed to an extreme; when the views on one side are counteracted by those on the other; when the party in power is confronted in all its movements by the party seeking for power; when her Majesty's Ministers must answer for their policy and conduct, before parliament and the country, to her Majesty's Opposition.

"The annals of party," says Mr. May, with much truth, "embrace a large portion of the history of England," and he refers in a note to Mr. Wingrove Cooke's "History of Party," to which he acknowledges many obligations, as relating "the most instructive incidents of general history." Of course he considers the subject under a more limited aspect than is done in the able and interesting work of Mr. Cooke, and confines himself chiefly to the influence of party "in advancing or retarding the progress of constitutional liberty and enlightened legislature." His general view on the subject may be gathered from the following statement of the principles represented by English parties:—

"The parties in which Englishmen have associated have represented cardinal principles of government—authority on the one side, popular rights and privileges on the other. The former principle, pressed to extremes, would tend to absolutism—the latter, to a republic; but, controlled within proper limits, they are both necessary for the safe working of a balanced constitution. When parties have lost sight of these principles, in pursuit of objects less worthy, they have degenerated into factions."—Vol. II. p. 2.

Several circumstances led to the revival of the Tory party on the accession of George III.; and their alliance with the king's friends at once placed them in a position of advantage over the Whigs—a position from which they were never permanently dislodged for the long period of seventy years. In addition to that respect for authority which had always characterized the party, they now adopted a principle not hitherto recognized by any set of Englishmen—a determined and indiscriminating opposition to change of any kind in our laws. A few amendments had been wrung from them by the opposition, backed by the rising influence of public opinion; but, in the main, the laws of England, as expounded by Blackstone, were the laws of England as they existed towards the latter years of the reign of George IV. But the new commercial policy inaugurated

by Huskisson, the partial mitigation of the penal code, the repeal of the Test and Corporation Acts, and the passing of the Catholic Relief Act, had, before the accession of William IV., shown that the old Tory creed could no longer be kept whole. After Parliamentary Reform had been carried, the Tories wisely discarded their ancient dogma, and professed themselves willing to amend the institutions of the country. Much of this altered state of feeling was due to the great change in public opinion, which had been gradually brought about by increasing intelligence—much to the impossibility of maintaining, under altered circumstances, their old position; but much also was due to the wise and liberal views of the late Sir Robert Peel. Great as a minister, he was, we think, still greater as a leader of opposition. While the Whigs during the first two years after the Reform Act were forwarding, what Mr. May justly calls "the noblest legislative measures which have ever done honor to the British Parliament," abolishing slavery, throwing open the commerce of the East, reforming the church in Ireland, averting the social peril of the Poor Laws, Sir Robert Peel maintained the cause of the opposition with the dignity of an English statesman. He frankly stated that he "considered the Reform Bill a final and irrevocable settlement of a great constitutional question—a settlement which no friend to the peace and welfare of this country would attempt to disturb, either by direct or indirect means." Avowing this principle, and professing to desire the improvement, but not the destruction, of our institutions, he gradually acquired an extensive influence throughout the country. A large proportion of the intelligence and respectability of the nation had been in favor of the Reform Bill, and of the ministry by which that measure was introduced and carried. Even many who had wished a less extensive change, but who saw that some change was necessary, had not been unfriendly to that great political experiment. The Whig party seemed to have gained a supremacy from which they would not be cast down, until a cycle of many years had brought round a revolution in public opinion and in all the relations of the State. The proposal to apply the surplus revenues of the Irish church to secular purposes, the breaking-up of the Grey cabinet, the weakness of the Melbourne ministry, and their supposed compact with the O'Connell party, joined to the great ability and prudence displayed by Sir Robert Peel, supported as he was by Mr. Stanley and Sir James Graham, loosened the hold of the Whigs on the country. Although several measures of importance were carried, the Melbourne ministry gradually lost influence; and, at last, the accession of Sir Robert Peel to power, introduced a new series of reforms which have been continued by the legislature down to the present time, and which have operated most beneficially on the material interests of the community.

How far Sir Robert Peel was justified, as a party leader, in proposing the Repeal of the Corn Laws, is a question entirely apart from the merits of the measure itself. Mr. May is of opinion that he was guilty of political disloyalty, and that his conduct was opposed to all the principles of party ethics:

"As a statesman," he says, "Sir Robert Peel was entitled to the gratitude of his country. No other man could then have passed this vital measure, for which he sacrificed the confidence of followers and the attachment of friends; but, as the leader of a party, he was unfaithful and disloyal. The events of 1829 were repeated in 1846. The parallel between 'Protestantism' and 'Protection' was complete. A second time he yielded to political necessity and a sense of paramount duty to the State, and found himself committed to a measure which he had gained the confidence of his party by opposing. Again was he constrained to rely upon political opponents to support him against his own friends. He passed this last measure of his political life amid the reproaches and execrations of his party. He had assigned the credit of the Catholic Relief Act to Mr. Canning, whom he had constantly opposed; and he acknowledged that the credit of this measure was due to 'the unadorned eloquence of Richard Cobden,' the apostle of free trade, whom he had hitherto scouted. As he had braved the hostility of his friends for the public good, the people applauded his courage and self-sacrifice, felt for him as he writhed under the scourging of his merciless foes, and pitied him when he fell buried under the ruins of the great political fabric which his own genius had reconstructed, and his own hands had twice destroyed. But every one was aware that so long as party ties and obligations should continue to form an essential part of parliamentary government, the first statesman of the age had forfeited all future claim to govern."—Vol. II. pp. 72, 73.

The portion of the present volume devoted to the press and liberty of opinion may be summed up in the words with which the author opens the subject:—

"We now approach the greatest of all our liberties—liberty of opinion. We have to investigate the development of political discussion; to follow its contests with power; to observe it repressed and discouraged, but gradually prevailing over laws and rulers, until the enlightened judgment of a free people has become the law by which the State is governed."—Vol. II. p. 95.

The greatest gain to constitutional liberty which was obtained during the reign of George III., was unquestionably the establishment of the freedom of the press. How far the doctrine laid down by Lord Mansfield, viz., that it was the province of the court only

to judge of the criminality of a libel, was sound in point of law, we shall not now take upon us to determine. But questionable as it might be on principle, it had certainly some authority in its favor, and was enforced, as Mr. May says, "with startling clearness by his lordship." To no man does the liberty of the press owe more than to Erskine, who boldly combated this view in his admirable argument in the Dean of St. Asaph's case, by which, as well as by his speech on the trial, public opinion was powerfully influenced. So strong was the impression produced, that on the first introduction in the House of Commons of Mr. Fox's Libel Bill, which was in the form of a declaratory law, there was not a dissentient voice, although when it finally passed the Upper House, Lord Thurlow and five other lords signed a protest, predicting "the confusion and destruction of the law of England." It was certainly destined to be "the confusion and destruction" of arbitrary prosecutions for libel —not, indeed, at once, for these continued for many years afterwards; but ultimately, as intelligent and liberal views spread through the community, it produced this result with signal effect, so that any government which should now attempt to restrain the liberty of the press by such means, would at once forfeit the confidence of the nation.

One unquestionable result of the liberty of the press has been to elevate the press itself. Higher intellects have been attracted to its service; and presenting, as it has long done, to the public rapid and full information on all events, both at home and abroad, and able comments on all the topics of the day, mere virulent invectives on public men are now considered as simply absurd, and produce, if by any accident they occasionally appear, no dangerous effects whatever. Even those slanderous attacks on private individuals which were once the disgrace of the press, are now almost unknown. Private persons are seldem brought before the public by the press, unless they intrude themselves on the world by their own actions, speeches, or writings; and the great question is always whether the comments are fair and honest as they purport to be. Addressing intelligent readers, and supplying important materials for thought and reflection, the conductors of the press would now feel it to be mere impertinence, unless under some imperative obligation of public duty, to drag individuals from the privacy of domestic life and hold them up to general censure or ridicule. Journalism has now become a profession, to secure success in which the possession of a copious vocabulary of scurrilous language, and of a large amount of bitter feeling, is of little avail.[1]

[1] The estimation in which the press was held in the early part of the present century in certain quarters may be gathered from the following circumstance, mentioned by Lord Colchester (Diary II. 240), and quoted by Mr. May:—"In 1808, the Benchers of Lincoln's Inn passed a by-law, excluding all persons who had written

Mr. May has treated the subject of the press in connection with the liberty of opinion. Public meetings, political associations, and "agitations," early in the reign of George III., began to exercise an influence over government and the legislature more powerful than even that of the press. It was in connection with Wilkes's election for Middlesex, in 1768, that public meetings first took their place among the institutions of the country. In no less than seventeen counties the freeholders met in support of the electors of Middlesex, whose rights had been violated by the Commons. But the meetings which were held ten years later for the purpose of discussing economical and parliamentary reform were still more formidable. The freeholders of Yorkshire and twenty-three other counties, and the inhabitants of many cities, were assembled by the sheriffs and chief magistrates; and at these gatherings all the leading men of each neighborhood were present. A great meeting was held in Westminster Hall, at which Mr. Fox presided, and was attended by many of the most distinguished members of the opposition. These assemblages were the results of concerted movements throughout the country; and committees of correspondence were appointed by the several counties, who kept alive the agitation. Other political clubs and societies were established, which kept before the public the different causes for the promotion of which they were formed, by meetings, deputations, resolutions, petitions, and publications. Such was the beginning of a system which was destined to produce the most powerful influence in advancing political reform and good government. Still more powerful is the influence they have had in forming the political habits of Englishmen, by making public discussion the great instrument of propagating opinions, and exciting the attention of the legislature.

In the chapter on the Liberty of the Subject, a very clear and succinct account is given of the proceedings against Wilkes, and the printers of No. 45 of the *North Briton*, which involved the great question of the legality of general warrants. When the bill of exceptions, which was tendered in Leach's case, came on to be argued in the Court of Queen's Bench, precedents were cited showing the practice of the Secretary of State's office ever since the Revolution; but Lord Mansfield pronounced the warrant illegal, saying, "It is not fit that the judging of the information should be left to the discretion of the officer. The magistrate should judge, and 'give certain directions to the officer." The other three judges concurred, believing that "no degree of antiquity can give sanction to a usage bad in itself." 3 Burr. 1742. In the action brought

for hire, in the daily papers, from being called to the Bar. The other Inns of Court refused to accede to such a proposition. On the 23d of March, 1809, Mr. Sheridan presented a petition complaining of this by-law, which was generally condemned in debate, and it was soon afterwards rescinded by the Benchers."

by Entick, a writer in the *Monitor, or British Freeholder*, for seizing his books and papers under a general search warrant, the same question arose. The warrant specified the name of the person against whom it was directed, but gave a general authority to the messengers to take all his books and papers, without specifying what particular papers were to be seized. On a special verdict, the Court of Common Pleas held the warrant to be illegal, although it was found by the special verdict that many such warrants had been issued since the Revolution. Lord Camden considered that the practice had arisen in the Star Chamber, and that, having been revived and authorized by the Licensing Act of Charles II. in the person of the Secretary of State, it had been continued after the expiration of that Act. *Entick* v. *Carrington*, 19 St. Tr. 1030. Lord Mansfield and the Court of King's Bench shared in this conjecture. *Leach* v. *Money*, 3 Burr. 1692, 1767. Lord Camden, it may be mentioned, doubted the right of the Secretary of State to commit at all, except for high treason; but the Court, from deference to prior decisions, felt bound to acknowledge the right.

From the Revolution to the rebellion of 1745, the Habeas Corpus Act had been frequently suspended. But although, during the American war, the king had been empowered to secure persons suspected of high treason committed in North America, or on the high seas, or of the crime of piracy, no attempt had been made to suspend the civil liberties of Englishmen at home, for nearly fifty years after the invasion of the realm by Charles Edward. In 1794, however, Mr. Pitt moved for a bill to empower his Majesty to secure and detain persons suspected of conspiring against his person and government, justifying the measure on the ground, that whatever the temporary danger of placing such power in the hands of the government, it was far less than the danger with which the constitution and society were threatened. Fox, Grey, and Sheridan, strongly opposed the bill, and denied that any such dangers threatened the State as would justify the surrender of the chief safeguard of personal freedom. The measure, however, passed, and was continued till the end of 1801.

"Though termed," says Mr. May, "a suspension of the Habeas Corpus Act, it was, in truth, a suspension of Magna Charta, and of the cardinal principles of the common law. Every man had hitherto been free from imprisonment until charged with crime by information upon oath, and entitled to a speedy trial, and the judgment of his peers. But any subject could now be arrested on suspicion of guilt; his accusers were unknown, and in vain might he demand public accusation and trial. Spies and treacherous accomplices, however circumstantial in their narratives to Secretaries of State, shrank from the witness-box, and their victims rotted in jail.

Whatever the judgment, temper, and good faith of the executive, such a power was arbitrary, and could scarcely fail to be abused. Whatever the danger by which it was justified, never did the subject so much need the protection of the laws, as when government and society were filled with suspicion and alarm."—Vol. II. pp. 265–6.

Great discussion took place before the Act had expired, on the bill to indemnify all persons who, since the 1st February, 1793, had acted in the apprehension of persons suspected of high treason. The bill was strongly opposed, but was justified on the ground that it would be impossible for persons accused of abuses to defend themselves, without disclosing secrets dangerous to the lives of individuals and to the State. There is, no doubt, much force in this justification of the bill of indemnity, though we cannot but agree with Mr. May, that "it were better to withhold such powers, than to scrutinize their exercise too curiously;" and that, "were any argument needed against the suspension of the law, it would be found in the reasons urged for indemnity." After the suspension of the Habeas Corpus Act, in 1817, a similar bill of indemnity was brought forward by ministers, and passed after strenuous opposition. The discussions, however, which arose, disclosed the great evils arising from suspending fundamental laws; and since then the Habeas Corpus Act has not been interfered with in England.

In the chapters on the Church and Religious Liberty we have a full account of all those memorable struggles so long maintained by the church against the claims of Dissenters and Roman Catholics to political equality. The granting of these claims and the reform of abuses within the church herself, have removed the grounds of much jealousy and ill-will; her position as a National Church has been by no means compromised by such concessions; and if her clergy are only willing, as to a great extent they are, to keep pace with the advancing enlightenment of the age, she has the opportunity of enjoying a much wider popularity, and doing a much larger amount of good than at any former period of her history. But one essential condition of her permanence and success as a National Church at the present day is, that she should retain and still further increase her power of comprehending men of various opinions and modes of thought.

"The fold of the church," says Mr. May, "has been found wide enough to embrace many diversities of doctrine and ceremony. The convictions, doubts, and predelictions of the 16th century still prevail, with many of later growth; but enlightened Churchmen, without absolute identity of opinion, have been proud to acknowledge the same religious communion—just as citizens, divided into political parties, are yet loyal and patriotic members of the State. And

if the founders of the reformed church erred in prescribing too straight a uniformity, the wisest of her rulers, in an age of active thought and free discussion, have generally shown a liberal and cautious spirit in dealing with theological controversies. The ecclesiastical courts have also given breadth to her Articles and Liturgy. Never was comprehension more politic. The time has come when any serious schism might bring ruin on the church."—Vol. II. p. 445.

The remaining part of the volume is devoted to a variety of subjects of much interest. In that which treats of the progress of general legislation, and which concludes the work, will be found a reference to the various measures of legal and financial reform, and others bearing on the social welfare of the community, which have been adopted in recent times. The observations of the author are very just and valuable, but the extent and variety of the subjects prevent him doing more than merely touching upon them. With respect to one important topic alluded to, viz. the improved spirit and temper of the judges, Mr. May has truly stated that the measure, passed at the suggestion of George III. which provided that the commissions of judges should not expire with the demise of the crown, although entitled to approval and respect, did not prevent them being leagued closely with the crown.

"But no sooner had principles of freedom and responsible government gained ascendancy, than judges were animated by independence and liberality. Henceforward they administered justice in the spirit of Lord Camden, and promoted the amendment of the laws with the enlightenment of statesmen."—Vol. II. p. 595.

We have already stated the high estimate we have formed of Mr. May's work, and we desire again to express, before concluding, our sense of the full and accurate information which it conveys, of the sound and judicious views which are put forward, and of the admirable spirit in which the whole is conceived and executed. In our notice of the former volume, we stated our approval of the plan adopted by the author of deviating from the chronological narrative, and treating the subject under certain leading heads. We still adhere to the view then expressed; but in reading the second volume, we confess we have occasionally experienced doubts as to whether this method has not somewhat impaired the interest of the book on continuous perusal, and we have heard similar feelings expressed by others. But be that as it may, there can be no doubt that the plan adopted is by far the most convenient for purposes of reference. Thus, the whole information connected with the revenues of the crown, the civil list, and pensions, is to be found under one chapter, and the different cases of suspension of the Habeas

Corpus Act are brought together in the chapter on the Liberty of the Subject. We give these only as instances, for the same advantage arises from the mode in which all the various topics which fall within the purview of the work are treated. Not only is much inconvenience avoided by this method, but each particular subject is more fully presented and more thoroughly discussed than would be possible, without much prolixity and repetition, in a chronological narrative.

RECENT AMERICAN DECISIONS.

District Court of the United States. — [PRIZE.]

District of Massachusetts.

THE SHIP LA MANCHE AND CARGO.

LEROU, FRERES & CO., *of Havre, Claimants of the Vessel.*

SIMON JOSE CAMPO, *of Valencia, Claimant of the Cargo.*

The captor cannot be held liable for damages in a case where the vessel captured presents probable cause for the capture, even though she was led into the predicament in which she is found involuntarily and by the mistakes of the revenue officers of the captor's own government.

SPRAGUE J. — This ship was taken on the high seas by the United States ship-of-war Ino, commanded by Captain Devens, and sent in for adjudication upon the supposition that she had come from a confederate port in violation of the blockade. She arrived at this port on the 28th day of August, 1862. The cargo was so far unladen as to exhibit the character of the whole, and it having been ascertained by due inquiry that the vessel had sailed from New Orleans with this cargo on board as set forth in her documents, the vessel and cargo were, on the 27th day of September, 1862, restored to the claimants with the consent of the captors. The respective owners of the vessel and cargo duly interposed claims for costs and damages, consequent upon the arrest and detention of their property. Upon this claim, evidence has been taken and fully heard, and able and elaborate arguments have been presented by the counsel on both sides. It appears that this was a French ship, owned by the claimants, Messrs. Lerou, Freres & Co.

of Havre, and that her officers and crew were Frenchmen. In the month of June, 1862, she was at St. Jago de Cuba. She there learned that New Orleans had been opened to foreign trade, by proclamation of the President of the United States, and sailed for that port, where she arrived on the 7th day of July, and soon afterwards discharged her cargo, and subsequently took on board a cargo consisting of 286 hogsheads of tobacco and 20,000 staves, which were shipped and owned by the claimant, Simon José Campo, of Valencia, in Spain.

She left New Orleans on the 31st day of July bound for Cadiz, and proceeded on her voyage, without interruption, until the 23d day of August. On that day, at about ten o'clock in the forenoon, she was discovered by the Ino. The course of the La Manche was then east by south, and that of the Ino south-south-east, which courses they continued until about twelve o'clock, and until the La Manche had just crossed the bows of the Ino several miles distant. The La Manche then slightly changed her course, and set her starboard topgallant and lower studding sails. The Ino then changed her course and made some additional sail in pursuit, and at about two o'clock she fired a gun and the La Manche immediately hove to. She was then boarded by an officer from the Ino, who, after examining her papers, carried them to his own ship, to be submitted to his commander. Captain Bourhis, the commander of the La Manche, voluntarily went with him. There a careful examination was made of all the papers by Captain Devens and by several of his officers, and some conversation was had with Captain Bourhis and explanations asked. No person belonging to the La Manche could speak or understand English. One of the officers of the Ino had some knowledge of the French language, but it was not such as to enable him adequately to interpret oral communications or translate written documents. There is no doubt that Captain Bourhis promptly and fairly produced all the papers and documents on board his vessel, and frankly and truly answered all the questions that were put to him, so far as the imperfect means of communication would permit.

It now becomes necessary that we should look at the circumstances which caused the arrest of the La Manche, as they presented themselves to Captain Devens and his officers. The principal ground of the arrest and detention was the condition of some of the documents found on board the La Manche. The Ino sailed from Boston on the 18th August, 1862, and on the 23d of that month, in about latitude 38° 19′ north and longitude 69° 6′ west from Greenwich, overhauled and boarded the La Manche as before stated. It is agreed by counsel that this was in the Gulf stream, and nearly off the mouth of Delaware Bay. I have not examined the chart myself. Among the papers of the La Manche, there were three

purporting to be from the custom house at New Orleans, which received particular attention and scrutiny from Captain Devens and his officers. They were a manifest, bill of health, and clearance. These were all in English, and made out by filling the blanks in printed forms. On one side of the document called the manifest, was a report or schedule of the cargo, duly and correctly made out. On the other side was a printed form of an oath which was taken and subscribed by the master of the La Manche, and certified by W. C. Gray, as deputy collector. In that printed form of oath were found these words, "I also swear, that I do verily believe that the duties on all the foreign merchandise therein specified, have been secured according to law, and that no part thereof is intended to be relanded within the confederate states." This clause against relanding in the confederate states arrested attention and excited strong suspicions in the minds of the captain and officers of the Ino. They had several of them been shipmasters, and it was apprehended that such a document could have been furnished only by a confederate custom house, in a confederate port, and that the vessel had run the blockade.

The officers of the Ino had other reasons for doubting the genuineness of these documents. Knowing that New Orleans was in the military occupation of the United States, by its land and naval forces, they supposed that the documents, if genuine, would bear the signature and authentication of some officer of the army or navy, yet no such signature appeared. The oath to the manifest was certified by W. C. Gray as deputy collector. This name was new to Captain Devens and his officers. They had no knowledge whether any such person was connected with the custom house in New Orleans. There was an apparent defect or irregularity as to the signature of the civil officer of the customs, called the naval officer. His name nowhere appears in full. On the clearance are the letters "E. S. H." followed by the words "Naval Officer." In the bill of health, the printed words naval officer, in the margin, had been erased, by drawing a pen through them, and, at some distance below, were the letters E. S. H.

The manifest made no mention of a naval officer, and bore no such letters or initials. Captain Bourhis was asked to explain how the clause respecting relanding cargo in the confederate states came to be in his manifest, and why the documents had no signature of a naval officer. But he had no explanation to give, and seemed to have no knowledge upon the subject. He appeared also upon inquiry to have no knowledge that General Butler was in command in New Orleans, or of any ships-of-war of the United States being there. But this apparent want of knowledge respecting our military commander may be attributed to the want of a

common language. There were no adequate means of intercommunication.

Another circumstance which attracted the attention of the captors, was the amount of cargo as stated in her manifest, compared with the apparent capacity of the vessel, as seen at sea. Upon examination by the boarding officer, it was found that not only was the hold filled up to the combings of the hatches, but that staves were stowed in the cabin and on deck.

The burthen of the La Manche, as stated in the clearance, was 401 tons, and so far as her hull could be seen above water, her construction appeared to be adapted to carrying a large cargo for her tonnage, and it seemed to the officers of the Ino that 286 hogsheads of tobacco and 20,000 claret staves, the cargo stated in the manifest, would not have filled such a vessel, and further that, if filled with goods of that description, she ought to have been deeper in the water. And they inferred that she had on board some other and lighter goods. In this, the officers of the Ino were mistaken. After being brought in, the La Manche was put into a dry dock, and it was then ascertained that her construction below the water line was sharp, with a great deal of dead rise, adapting her to sailing, but not to carrying well, and that these hogsheads could not be stowed to advantage, and that she was, in fact, entirely filled by the cargo set forth in her manifest.

It further appeared, from her log-book and papers, that she left New Orleans on the 31st day of July, and had thus been twenty-three days in making the passage to the place where she was boarded. This appeared to the officers of the Ino to be a very long time for the distance made; but, what seemed still more remarkable, was that during all that time she had not, according to her log-book, seen or spoken an American cruiser.

It has already been stated that the La Manche somewhat changed her course, and made more sail about the time she crossed the bows of the Ino. This tended to strengthen the suspicions of the captors. The La Manche, when first seen, bore about four points on the weather bow of the Ino, the wind being southwesterly, and the course of the Ino being south-south-east, and that of the La Manche east by south. The weight of evidence is that the La Manche put away only about one point, or, between one and two points, and set her topmast and lower starboard-studding sails, and that this change of course was about the time she crossed the bows of the Ino, that is, when she intersected the line on which the Ino was sailing. Until that line was reached, the courses of the two vessels converged; after it was crossed they diverged, and if both vessels had kept on, the distance between them would have been constantly increasing. By putting away, the La Manche lessened the divergence. But it was supposed that this was intended to enable her to set all her

starboard-studding sails, so that they would draw, and thus increase her speed. The Ino then changed her course in pursuit, and afterwards overhauled her, as before stated.

The last entry in the log-book of the La Manche was on the day of the capture, and related to her being pursued and overhauled. It was in French, and there seems to have been some misapprehension, or at least doubt, among the captors as to its precise meaning. It is however of very little consequence.

Two other suggestions are made in the evidence, namely, that the place where the La Manche was found was further northward than she ought to have been if really bound for Europe, and that in the bill of lading a blank for the year was not filled; the printed figures "186 ," having a blank after them, which should have been filled with a figure 2, or some other. These, however, are unimportant.

To judge Captain Devens's conduct rightly, we must see how the circumstances were presented to his mind, without the information which has since been acquired. The document called the manifest, particularly in the printed declaration and oath, not only contained that startling clause against relanding the cargo in the confederate states, but was, in its general form and construction, quite different from any used at the Boston custom house, and also, it is believed, from those used in other ports of the United States. The document bears upon it marks of a confederate origin, warranting not only a strong suspicion, but an actual belief that it came from a confederate custom house. Indeed, that theory has been adopted by the counsel on both sides. They suppose that all the printed part of this document was of confederate origin; that it was a form adopted and used by the rebels while they were in possession of New Orleans, and was by them left there, and was made use of for this vessel, without erasing the clause respecting the confederate states, or making any addition or alteration substituting or naming the United States. This theory is adopted after it has been ascertained that this document was actually obtained at New Orleans, and it is certainly extraordinary that an officer of the customs should furnish or authenticate a confederate blank without erasing the part which marked it as a confederate document, or adding anything to show that it was issued in the name of the United States. But the doubt presented to Captain Devens was, whether this document had been actually furnished by the United States custom house at New Orleans.

That doubt could not properly be solved without a further inquiry which could not then be made, upon the ocean. Further than this, neither of the three documents purporting to come from the custom house at New Orleans, had the signature of the naval

officer. One of them, indeed, had certain letters which might be initials, before the words naval officer, and the other had the same letters, or initials in the margin above which the printed words "Naval Officer" had been erased by drawing a pen through them. These peculiarities and the want of due authentication by the naval officer of the custom house or any military officer at New Orleans, might well strengthen the suspicion and doubt created by the manifest.

To this condition of the papers were added the other circumstances already referred to, viz.: the disproportion between the cargo and the apparent carrying capacity of the vessel, the length of her passage, and that, too, without having seen an American man-of-war, the changing her course and making additional sail. These were untoward circumstances calculated to strengthen the unfavorable impression which the condition of the documents had created. These circumstances thus combined not only warrant the belief that Captain Devens, in sending the La Manche in for further investigation, acted with honest intentions and from a sense of duty, but they go further and relieve him from any imputation of negligence, or rashness, or other culpability.

On the other hand, there is now no doubt that the La Manche was engaged in a lawful voyage, with the most innocent intentions, that her whole cargo was taken on board at New Orleans, and that she sailed from that port directly to the place where she was captured. On being boarded, Captain Bourhis promptly produced all his papers, and, on doubts arising, voluntarily accompanied the boarding officer to the Ino, and there fairly and frankly answered all questions put to him, as far as they could be understood, and he could render his answers intelligible. All his French documents were perfectly correct, and there is no reason to doubt that he verily believed that those in English were equally so. How it happened that such documents were obtained by him at New Orleans does not even yet appear. What part the consignees or agents of the ship had in furnishing or procuring the printed forms and filling the blanks, or what part the custom house officers had therein, we do not know. As to her change of course and setting starboard-studding sails, it is proper to remark that a neutral merchant ship has a right to endeavor to keep out of the reach of a man-of-war, to prevent the inconvenience of being overhauled and searched. She must indeed heave to upon the firing of a gun, within proper distance, and this was promptly done by Captain Bourhis. If, therefore, this change of course had been for the purpose of keeping away from the Ino, it could not have been imputed to him as a fault. But Captain Bourhis, in his examination, testified that such was not the purpose. He says that at twelve o'clock, upon taking an observation, it was found that the

course she was then sailing was not perfectly correct, and that, in order to make it so, she was put away about one point, and I see no sufficient reason why this explanation should not be accepted as true.

The La Manche having committed no offence, was, while pursuing a lawful voyage, forcibly arrested and sent into this port. Is Captain Devens, the captor, to be held personally responsible for the damages sustained by the owners? This involves two inquiries.

First, did the circumstances, as they were presented to Captain Devens, constitute a case of probable cause, without regard to their origin?

Second, if they did, does the fact now known, that the suspicious papers actually came from the custom house at New Orleans, deprive the captor of the protection of probable cause?

As to the first, the term "probable cause" has received various definitions or expositions. It is well settled that it is not necessary, in order to constitute probable cause, that the circumstances should be such as to make a *prima facie* case for condemnation. It is important to keep this in view. *Locke* v. *The United States*, 7 Cranch, 339; *The George*, 1 Mason, 26. As to what is sufficient to constitute probable cause, see *The George*, 1 Mason, 26; *The Marianna Flora*, 11 Wheat. 1; *The John*, 2 Dods. 336; *Aline and Fanny*, 10 Moore, 501; *The Mary*, 9 Cranch, 126; *The Maria*, 11 Moore, 287. See also other cases hereafter referred to.

An exposition of the highest authority is found in *Locke* v. *The United States*, 7 Cranch, 339, where the supreme court declared that, the terms "probable cause" in all cases of seizure, have a fixed and well known meaning, that they import a seizure made "under circumstances which warrant suspicion." It has been held that the same rule applies in cases of prize. *The George*, 1 Mason, 26. See also *The Mary*, 9 Cranch, 126.

There are many cases in which the court speak of there being or not being grounds of suspicion, as if that were the criterion by which to determine the liability of the captor. I presume, however, that it is not to be understood, that every ground of suspicion, however slight, will justify the captors. *Malay* v. *Shattuck*, 3 Cranch, 489.

There are many cases in which doubts as to the law have been held to justify a capture or seizure. Some of these will be cited in another connection. One of the strongest is *United States* v. *Riddle*, 5 Cranch, 311.

I think it may at least be said, that, if under a true construction of the law, all the facts within the reach of the captors present good grounds for substantial doubt as to the guilt or innocence of the vessel, the captors will be exempted from liability. Circum-

stances of extreme delay, danger and damage may be supposed, which may constitute an exception to this rule. But if there be reasonable doubts, for the solution of which it is reasonable, under the circumstances, to send the vessel in for investigation, then there is what the law denominates probable cause.

It is proper for the captor to ask explanations from the captured, and if satisfactory, it is well; but he is not bound to take their statement of extrinsic facts as true. *The Apollo*, 4 Rob. 160.

Now, looking at all the facts within the reach of the captor, at the time the La Manche was arrested, I think that they presented good ground for substantial doubts whether she had sailed from New Orleans or from some confederate port in violation of the blockade. In addition to the extraordinary and unaccountable character of her papers, there was the disparity between the cargo set forth in the manifest and the apparent capacity of the vessel, the length and course of the passage from New Orleans without speaking an American cruiser, and her changing her course and making more sail, and continuing the same during the chase. This last circumstance, although not to be imputed as a fault, still was unfortunate. Such circumstances have been held, in a very recent case, to strengthen the suspicions arising from other causes, and to combine with them in justifying a capture. In the *Aline and Fanny*, 10 Moore, 501, a neutral ship was sent in for adjudication solely on suspicion of an attempt to break the blockade of a port in Finland. The Privy Council, in giving their judgment, hold the following language, "Here there were appearances created by the act of the ship herself, which might justly excite suspicion. She had come across the Gulf of Bothnia, at a point where, as we understand, the Gulf is between fifty and sixty miles broad, from the Swedish towards the Finland coast. She was not in the straight course from Umea to Haparaanda. When she was descried and followed by Her Majesty's ships then lying off the port of Jacobstadt, she did not slacken sail but pursued her course, till she was brought-to by a shot from the 'Tartar,' after what seems to have been a chase of above two hours. Surely these circumstances were abundantly sufficient to excite the just suspicion of the captors as to the character and purpose of this vessel, and to afford probable cause for capture." There is another view. It has been held, that if the case be one for further proof, there is probable cause. But the converse is not true. That is, although restitution be ordered without further proof, it does not follow that the sending in was improper. *The George*, 1 Mason, 26; *The Mary*, 9 Cranch, 126; *The Apollon*, 9 Wheat. 372; *The Apollo*, 4 Rob. 165.

By further proof, is meant, that which is derived from some other source than the vessel and cargo and the papers and persons

found on board. In this case, if the first hearing had been had before time enough had elapsed to obtain information from New Orleans, and either party had moved for leave to obtain evidence from that place, I should have granted that motion.

I should have deemed the doubts arising from the papers to be strong enough to render it proper to obtain such evidence, *ab extra* for their solution, that is, for further proof. No hearing upon the preparatory evidence alone was had, because neither party moved for it. When information had been obtained respecting the clearance from New Orleans, and the cargo had been unladen, it was so satisfactory, that is, the doubts and difficulties presented by the preparatory evidence were so effectually removed, that the counsel for the captors at once consented to an order of restitution, and the vessel and cargo were delivered to the claimants. I am of opinion that the circumstances as they were presented to Captain Devens, if we have no regard to their origin, constituted a case of probable cause.

This brings us to the question whether the fact now known that the suspicious papers actually came from the custom house at New Orleans, deprives the captor of the protection of probable cause.

I have no doubt that the counsel for the claimant is right in considering these papers the main cause of the La Manche being sent in, and that without this ground of unfavorable suspicion she would not have been detained. This is shown not only from the comparative force of the circumstances themselves, but by the direct testimony of Mr. Winslow, an ensign and still more strongly by the written instructions given by Captain Devens to the prize master who brought her in.

Here let us see what was done at New Orleans. That these papers were authentic, there is no doubt. But how it happened that such papers were furnished or sanctioned by the custom house officers, has not been shown.

The manifest is far the most important. This document purports to have been made out by the master of the La Manche. It contains, in the first place, a schedule of his cargo, which must have been made out by him or his agent, and in the next place, the oath taken and subscribed by him. This oath was administered by the collector. It may be that the consignee or agent had this printed form in his possession at the time the confederate officers left the custom house, and made use of it on this occasion; or, it may have been left by the rebels at the custom house, and carelessly taken by the United States officers, and furnished to Captain Bourhis. He did not understand English, but he might have employed, and doubtless did employ agents who understood the language and the course of business, and whose acts must be deemed his acts. It is certain the master

of the La Manche had some share in preparing and receiving these documents, and that the custom house officers received and authenticated them. His participation in the errors may have been quite excusable, still it is true that he was a joint actor. It was at least possible for him, as for the custom house officers, to have examined and ascertained the condition of these papers. On the other hand, Captain Devens had no participation whatever in the mistakes made at New Orleans, and could not by possibility have prevented them. Why then should he be made personally responsible for the consequences of those mistakes, and that, too, in favor of the La Manche, whose agents participated in them. He was compelled to act upon the facts within his reach. From the appearances and circumstances presented by the La Manche herself, he, after due consideration, came to the conclusion that there was probable cause for sending her in. This judgment was correct. And it is to be borne in mind that it was the only judgment which he was required to form, being that upon which alone he was required to act. We have no occasion to inquire, because it is immaterial, whether he had formed an opinion as to a final condemnation. For it was not necessary that there should have been a *primâ facie* case for condemnation. All that he had occasion to determine, and all that he did determine, so far as we know, was that there was probable cause, and being correct in this, it cannot be said that he made any mistake whatever. It does not seem consonant to natural justice that he should be made the victim of the mistakes of others, even if the claimants' agents had been equally removed from any participation in them.

It has been contended in behalf of the claimants, that this vessel was invited to New Orleans by proclamation of the President, that she had a right to rely implicitly upon the correctness of documents furnished or sanctioned by custom house officers; that, in doing so, no fault can be imputed to her by any of the United States authorities; that while pursuing a lawful voyage, she was arrested by an officer of the United States, and that our government is bound to indemnify her for the injury thus sustained; and it is further insisted that if the government be liable, the captor is liable. Now it may be that the government of the United States ought to indemnify these claimants. I am by no means prepared to say that it should not. But if it ought to do so, it does not follow that the captor is liable to the claimants. The obligations of the government, and the liability of the captor, are distinct questions; and it is the latter one that I am called upon to decide.

The counsel for the claimants insists that their view is sustained by authority. The case chiefly relied upon is *The Ostsee*, decided by the Privy Council in 1855, reported in 9 Moore, 150. In that case, the Ostsee, a neutral ship, sailed from

Cronstadt in May, 1854, and a few days afterwards was captured by a British cruiser, solely on the ground of a breach of blockade. After being libelled, the vessel was restored by consent of the captors, the only contest being whether they should be required to pay to the claimants costs and damages. This question the High Court of Admiralty decided in the negative. The Privy Council, on appeal, reversed that decision. The only ground of capture was an alleged breach of blockade, in sailing from Cronstadt; and yet, strange to say, no blockade existed at the time of her sailing, nor at the time of her capture, nor until three weeks afterwards. There was no blockade, even by proclamation, or on paper. The vessel was proceeding in an innocent manner, on a lawful voyage, not only without reasonable cause for detention, but without presenting one circumstance of suspicion. It was, indeed, contended that a certain document was wanting, but the court held that that assertion was not proved and was to be disregarded. The sending in must have been merely from the hope that something might be discovered, upon an investigation in a prize court; yet, in such a case as this, the High Court of Admiralty refused to award costs and damages against the captor, because it was said there was some confusion in the minds of the British officers as to the blockade.

Now, if such confusion existed, it was in no degree attributable to the neutral ship. The Privy Council, page 170–1, say: "We find no trace in the evidence, of any confusion or doubt as to the period when the blockade commenced, and if there had been, it was a confusion created only by the acts and in the minds of Her Majesty's officers, and could not, therefore, according to the principles which we have collected from the authorities, have afforded any answer to a neutral perfectly innocent of all fault, and not, by any act or neglect of his, voluntary or involuntary, exposed to any suspicion."

There is really more of contrast than resemblance between the facts in the Ostsee and those in the case now before me. There, then, was no probable cause, and if the captor supposed there was, he made a gross mistake. Here, the circumstances presented by the vessel constituted probable cause, and the captor formed a correct judgment.

Another ground taken in behalf of the captor of the Ostsee, was that he acted under the order of Admiral Napier. This defence was not sustained by the court. It was inconsistent with the doctrine that an illegal act cannot be justified by the order of another, even if that other be a military superior. *Mostyn* v. *Fabrigas*, 1 Cowp. 180; *Mitchell* v. *Harmony*, 13 How. 115. The orders of the Admiral were not regarded by the court as the orders of the government.

An authoritative exposition of the true meaning and extent of

the opinion in the Ostsee has been made by the same court in the subsequent case of the *Aline and Funny*, 10 Moore, 500, where it is said: "This must depend upon the question whether this ship has brought herself within the class within which the Ostsee, in the opinion of the judges who decided that case, was clearly brought; that is to say, in the language there used, of a capture where not only the ship was in no fault, but she is not by any act of her own, voluntary or involuntary, open to any fair grounds of suspicion."

The counsel for the claimants have not relied so much upon the point decided in the Ostsee as upon the remarks of the court on page 164, where it is said, that in case of error occasioned by the proceedings of the government, the captor is liable; and as a reason for this it is said that the state is liable, "and if the state could not urge its own mistakes as a justification of its own wrong, neither, it should seem, should individual citizens be permitted to do so." That this is a mere *dictum* is evident. On page 177 it is distinctly said that the government had not done anything to mislead the officers. This *dictum* is not to be understood as declaring that if the state be liable every citizen is liable, but only such as have participated in the error, that is, captors who have acted under a mistake into which they have been led by the proceedings of the government. This is evident from all the authorities referred to, as will be seen presently. And it is to be remarked that this *dictum* does not profess to advance any new doctrine, but merely to give the result of the authorities.

In the first place this *dictum* is in opposition to several authorities, and is not sustained by a single English decision cited, and by only one American decision. In the second place it has no application to the case now before me.

The first English case referred to, in the opinion in the Ostsee, is the *Actæon*, 2 Dods. 48. This was greatly relied upon. There an American vessel sailing under a British license was captured and destroyed by a British cruiser. The judgment pronounced by Sir William Scott shows that this vessel, so far from presenting any reasonable cause, hardly furnished any pretext for the capture and destruction. It was suggested, in palliation of this act of the British commander, that he apprehended that the Actæon, if permitted to proceed on her voyage, would have carried to the United States information which would have been used to the injury of Great Britain. The truth is, that the British officer had committed a palpable outrage. Sir William Scott did justice to the claimants by awarding costs and damages, but manifested a strong desire to screen Captain Capel from obloquy, and to that end, threw in many soft words, and volunteered the gratuitous supposition that he acted under orders from his government. No such orders were

shown in defence. If they had been, we cannot doubt that they would have been held to be a perfect shield against any liability to foreigners. Such has been the British doctrine, and it was illustrated in the case of McLeod, which was briefly this: In 1837, during the Canadian rebellion, a British armed force crossed the Niagara river, came within the limits of the State of New York, forcibly entered and captured the steamer Caroline, then moored to the shore, within the United States, and, while so doing, killed a man by the name of Durfree, who was on board of her. The British force then took the steamer from her moorings, carried her into the current of the river, set fire to her, and sent her in flames over the Falls of Niagara. Some years afterwards, a Canadian, by the name of McLeod, while in the State of New York, declared that he was one of the band that had thus captured and destroyed the Caroline. He was indicted in New York for the murder of Durfree. Thereupon the British government assumed the responsibility of the whole transaction, as done by their authority, which they insisted gave immunity to McLeod and his associates, and they demanded his immediate release. This demand was made, not upon the assertion that the act of entering our territory and capturing the Caroline was justifiable, but solely on the ground that the British government was alone responsible, and that a soldier acting under its orders could not be held liable. It is now known that if the court in New York had convicted and punished McLeod, instant war would have been the consequence.

The other decisions particularly referred to in *The Ostsee*, in support of that *dictum*, are the cases known as the *Cape Nicola Mole* cases,—*The Hulah*, 3 Rob. 235, and *The Driver*, 5 Rob. 145,—in which it appears that several French and Dutch ships were carried before the Admiralty Court in St. Domingo and condemned as prize. But that court was not a Prize Court, and had no jurisdiction. Subsequently the claimants applied to the High Court of Admiralty for an order upon the captors to proceed to adjudication, which was granted. At the hearing, the only ground of defence was a condemnation by the Admiralty Court in St. Domingo, and it was insisted that the captors had reason to suppose that it had jurisdiction, because instructions from the government had been addressed to it as a Prize Court. But Sir William Scott held that the proceedings before that tribunal were mere nullities. It is to be observed that there was no evidence whatever that there was probable cause, or even the slightest ground, for the original capture. The whole scope of the decision was, that a proceeding, which took place after the vessel had been carried in, and which was a mere legal nullity, could afford no protection to the captor against his liability for an original capture and sending in, for which there did not appear to

be any ground whatever; and that this was so, although some act of the government may have led the captor to believe that the court at St. Domingo had jurisdiction.

I have dwelt upon these authorities at some length, because they have been earnestly pressed upon the court, and are supposed to be the strongest in favor of the claimants. That they fall short of sustaining the claim now before me is manifest. Not one of them goes the length of holding that the captor can be liable in a case where, upon a true construction of the law, the vessel herself presents probable cause, even although the vessel may have been involuntarily led into the predicament in which she is found.

There are certain cases cited for the captors, and still more favorable to them, which should not be overlooked.

In *Le Louis*, 2 Dods. 210, it appeared that a French ship, in the year 1816, while proceeding on a voyage to the coast of Africa for the purpose of obtaining a cargo of slaves, was attacked by an English armed cutter. A conflict ensued, in which lives were lost on both sides, but it ended in the capture of the vessel, and she was sent into Sierra Leone for adjudication. This was in time of peace. The cutter that captured her was fitted out under the authority of the Colonial Government, for the purpose of carrying into effect the British statutes for the suppression of the slave trade. The cause was carried by appeal to the High Court of Admiralty. Sir William Scott decided that the slave trade was not piracy by the law of nations; that a French ship was not subject to the British statutes respecting that trade, nor bound to submit to visitation and search in time of peace; and that the attack and capture were an aggression not authorized by any law; and yet he refused to allow to the claimants either costs or damages against the captors.

In *The San Juan Nepomuceno*, 1 Hagg. 265, a Spanish slave ship was in the year 1817, being a time of peace, forcibly taken by a British colonial armed ship, and carried into Sierra Leone. The cause was carried by appeal to the High Court of Admiralty in England. Sir William Scott affirmed his previous decision in *Le Louis*, and held that the Spanish ship was pursuing a voyage which to her was lawful, and that her arrest and detention were wrongful. At the first hearing he refused to make an order of restitution against the captors, because the cargo consisting of negroes had been delivered over to the government, and he reserved the claim for costs and damages against the captors for further consideration. Subsequently counsel were heard on that question, and the claim was rejected.

In both these cases the captured vessel was in no fault, and had presented no circumstance or appearance to mislead the captor, and his only excuse was that he had acted under a mistake of the law,

to which government officials had greatly contributed. But he had had abundant opportunity to examine the law for himself.

The Luna, Edwards, 190, was an American vessel bound to St. Sebastian, and captured for an alleged breach of a paper blockade, which had been established by the orders in council of 1809. It was held that those orders did not embrace St. Sebastian. The vessel, therefore, upon a true construction of the orders issued by the sovereign of the captor, was not only in no fault, but had given no color for the capture. Yet Sir William Scott not only refused to give costs or damages to the claimants, but, what is most extraordinary, compelled them to pay the expenses of the captor.

In *United States* v. *Riddle*, 5 Cranch, 311, the Supreme Court of the United States held, that a doubt as to the law justified the seizure, and refused to award damages to the claimants, although the doubt was by no means a grave one.

But there is another decision by the same high tribunal, which wears a different aspect, *The Charming Betsy*, 2 Cranch, 64. This vessel was seized on the ocean for an alleged violation of a statute of the United States. The Supreme Court held that the circumstances presented by the vessel did not constitute probable cause, and that the captor was liable in damages, although his orders were such as might well have led him to believe that there was probable cause. They further speak of him as the victim of a mistake, which he had committed. That decision is of the highest authority, and absolutely binding in this court, except so far as it may be modified by the subsequent case of the *United States* v. *Riddle*, above referred to. But taken in its utmost extent, it falls far short of sustaining the present claim. There the vessel presented no reasonable cause for capture, and in supposing that she did so, the captor made a mistake of the law. In the present case the La Manche did present reasonable cause, and Captain Devens made no mistake of the law.

It thus appears upon examination of the authorities, that there are numerous cases in which the captured vessel was in no fault, and had not, under a true construction of the law, presented even ground of suspicion, and yet the captor was exonerated because he acted under an honest mistake of the law. But not a single case has been found in which the captor has been held liable, when, upon a true construction of the law, the vessel herself presented reasonable cause for the capture; and such is the case of the La Manche.

I am thus brought to the conclusion that this claim for costs and damages against the captors cannot be sustained.

R. H. Dana, Jr., for the captors; *H. F. Durant* for the claimants of the ship; *Causten Browne* for the claimants of the cargo.

United States *v.* 1363 Bags of Merchandise.

New trial.—Grounds upon which a Court of Common Law may grant a new trial.

It seems that the proper construction of the act of 1799, ch. 22, § 67, requires that each package shall be examined by a custom house officer in the presence of two merchants, and that to constitute such presence the merchants must be in such a situation as to be able to witness such examination, and to see and testify to a part at least of the contents of each package.

The facts in the case sufficiently appear in the opinion of the court.

Sprague J.—In this case there has been a verdict for the United States, and the claimants of the property move for a new trial.

The question how far the power of the court extends in granting new trials has been elaborately discussed by the counsel for the United States.

It is admitted that if the verdict rests on wrong instructions, or, if, with correct instructions it rests on a mistake or disregard of the law by the jury, or if it is the result of bias, or mistake of facts,—in short, if the verdict is not the result of the judgment of the jury on the facts in evidence with a correct application of the law, the court may order a new trial; but it is contended that if the result is a verdict of the jury, in the sense of law,—that is, a result of the judgment of the jury upon a correct application of the law, the verdict must stand; and it is urged that to grant a new trial for other reasons is to infringe upon the constitutional right of trial by jury.

It is to be remembered that a new trial does not remove the cause from the jury to the court, but from one jury to another. The question is not which tribunal, the court or the jury, shall decide the case, but how far a verdict of one jury is conclusive against a motion for a re-trial before another jury.

The idea that the constitution renders a first verdict sacred, so as to interfere with the allowance of a second trial, is of recent origin. Formerly, in Massachusetts, the losing party could have a second trial as of right by merely claiming an appeal. If the second verdict was the same as the first, it was conclusive unless the court, in its discretion, should see fit to set it aside. If the result of the second trial was different from that of the first, the losing party had a right, by a process of review, to have another trial. The losing party in this third trial having had two verdicts against him was concluded thereby unless the court should grant him a new trial. By this system it was not thought safe to rely upon the finding of a single jury. A party could claim a re-trial as matter of right until two verdicts had gone against him, and even

then the court had the power to grant another trial if in their discretion they should deem it proper. This system commenced at an early period, and was in operation for a long time. It continued for some years after Maine became a separate State. I had there some agency in bringing about a change.

The first step was to take away the right of a third trial, that is, the process of review. Those in favor of this change did not contend that the constitutional right to trial by jury was infringed or impaired by allowing a second and third trial. That idea was never suggested. Their arguments rested wholly upon expediency. It was insisted that such protracted litigation was unnecessary, and created great expense, vexation and danger of perjury. No one contended that a single verdict ought to be conclusive. On the contrary, the advocates for the abrogation of the old system urged that the known power of the court to grant new trials would be a sufficient safeguard against erroneous and improper verdicts, and that it should be left to an impartial tribunal to determine whether justice required a reinvestigation, rather than to the will of a biassed, perhaps heated and vindictive party.

The constitution secures a trial by jury, without defining what that trial is. We are left to the common law to learn what it is that is secured. Now the trial by jury was, when the constitution was adopted, and for generations before that time had been, here and in England, a trial of an issue of fact by twelve men, under the direction and superintendence of the court. This direction and superintendence was an essential part of the trial. The question really is, what is the extent of the superintending power? The court was undoubtedly authorized to exercise a supervision over verdicts, and to sustain them or set them aside. This power was given for the furtherance of justice. But the law did not specify the cases in which verdicts should be set aside and new trials granted. That was left to the judgment of the court. It rested wholly in the discretion of the judge to determine under what circumstances and for what causes a verdict should be set aside. And his decision was final, being subject to no revision by appeal or writ of error. Yet, as in other cases of discretion, it was not intended to be an arbitrary or capricious, but a judicial discretion, to be exercised for good reasons. But each judge must determine for himself the sufficiency of the reasons. He should indeed welcome all the light that could be thrown upon his path, and carefully examine the decisions of his predecessors, to see how far the practice of the courts has gone and what rules or principles could be deduced therefrom. These rules could not indeed bind his own judgment, but, having been practically adopted by enlightened jurists, they would, to some extent, aid and influence the formation of his own opinions. Prior decisions were examined, not because

they could make or authoritatively declare the law prescribing the circumstances under which a new trial should be granted, but as tending to show how a discretionary power could be most wisely exercised.

It appears, then, that at the time of the adoption of the constitution, it was a part of the system of trial by jury in civil causes that the court might, in its discretion, set aside a verdict. This power had for a long time been frequently and freely exercised without question; and if a judge does not go further in granting new trials than the known practice of the courts at time of the adoption of the constitution, he cannot be justly charged with encroaching upon the trial by jury. On the contrary, he may be said to uphold it, because each party, the losing as well as the winning, has a right to the legitimate trial by jury, with all its safeguards, as understood when the constitution was adopted. As to the practice in our own courts, we have no reports of decisions prior to the Revolution, but it is known that they were founded upon and followed those of the common law courts in England. Mr. Dane, who was an eminent public man and a learned lawyer during the Revolution and at the time of the adoption of the Constitution, lays it down without qualification in his great work on American Law, that the granting of new trials rests in the discretion of the court, and that it is a maxim that a new trial should be granted when justice requires it. He refers to some of the English decisions to show in what cases this power had been exercised. Those decisions are very numerous, and show that the court had little hesitation in granting a second trial where the result of the first had not been satisfactory. The mere certificate of the judge who tried the case that he was not satisfied with the verdict, was sometimes sufficient cause for setting it aside. I shall not attempt an enumeration of the English decisions, but refer to one which took place just previous to our Revolution, and which more than covers the case now before me. It is *Norris* v. *Freeman*, decided in 1769, and reported in 3 Wilson, 38.

The question for the jury in that case was whether the signature to a release was genuine. There were two attesting witnesses, one of whom was called and testified to the signature, and said that the release was signed at the plaintiff's house. The same party called witnesses acquainted with the handwriting of the supposed signer who testified to their belief that it was genuine. The other side called witnesses who testified that the parties to the instrument were not and could not have been at the place of signature at the time of the date of the instrument. It did not however appear positively that the date was not inserted prior to the time of the alleged signing. They also called persons familiar with the handwriting, who testified against its genuineness. The other attesting

witness was not called by the party relying upon the release, nor was any reason given for not calling him. The verdict established the release. It was set aside, not on the ground that it was unjustifiable on the evidence before the jury, but because the party setting up the release might have called the other attesting witness, and, in such a state of the evidence, there ought to be a new trial in order that the available direct testimony might be produced. Yet, in that case the jury might and should have weighed the fact of the non-production of that witness as bearing against the party setting up the release.

In the case now before me, one question put in issue was whether the goods had been examined as prescribed in the 67th section of the Statute of 1799, chap. 22. The government held the affirmative, and to maintain it called four witnesses, a custom house officer and three merchants. The officer and one of the merchants testified in general terms that they all four went to the place where these bags were deposited, and there made an examination of them, but they did not describe the manner of that examination. The next merchant called went one step further and said that the bags were laid out in rows, and that the examination was made by passing along by the several rows. The other merchant, being the one last called, testified that there were twelve or thirteen rows of bags, and that he examined only a part of them. And thus the evidence was left without particular inquiry or description of the mode in which the examination was made. The fair inference to be drawn from this testimony was that there had been a division of labor, by each merchant taking a separate row and examining the contents of every bag in that row; and thus, every bag was examined by some one of the merchants, but not by two of them. This seemed to be the necessary conclusion from the testimony of the last two merchants, and entirely consistent with that of the other merchant and the officer, who both testified in general terms that all the bags were examined, without stating that any one of them was examined by two persons, or by the officer when any two of the merchants were in a situation to see any part of the contents thereof.

Upon recurring to the statute I was of opinion that it required that each package should be examined by a custom house officer in the presence of two merchants, and that, to constitute such presence, the merchants must be in such a situation as to be able to witness such examination, and to see and testify to a part at least of the contents of each package. In this view of the law, it seemed to me that the evidence of the examination was incomplete, and that a further statement as to the manner in which it was made was desirable. I thereupon stated my view of the requirements of the statute, and suggested to the counsel for the Government that

he might, if he saw fit, recall his witnesses to state fully the manner in which the examination of the packages was made. But neither of them was recalled. In charging the jury, I laid down the law as to the construction of the statute, as I have above stated it, and endeavored to make them comprehend it. I recapitulated the evidence respecting the examination, but did not deem it necessary to make any remarks upon it.

The jury returned a verdict for the Government. This was unexpected. It seemed to me that they must have misunderstood or disregarded either the law or the evidence.

There was no conflict of testimony. All the evidence came from the four witnesses introduced by the Government, the custom house officer, and three merchants selected by him. No one of them had detailed the manner of the examination so as to make it clear that it was such as the statute required, while one of them, at least, had made a statement from which it was to be inferred that it was not. All doubts and difficulties might have been removed by recalling these witnesses or a part of them. They must have well known their own mode of proceeding. It was not known to the claimants, they not being present. I think that this case not only comes within the authorities already cited, and the practice of courts previous to and at the time of the adoption of the Constitution, but within the most restricted exercise of the power of granting new trials which has ever been known in our courts.

The question whether the examination of this merchandise was such as the statute requires, must be submitted to another jury.

Under the second plea, the jury have found that the contents of the packages differed from the entry. I do not think it necessary that this or the other matters embraced by the verdict should again be tried, and the new trial will be granted upon such conditions that the contestation before the jury shall be confined to the mode in which the examination of this merchandise was made, saving however to the claimants the benefit of all exceptions which were taken to the rulings and instructions of the court.

R. H. Dana, Jr., and T. K. Lothrop, for the United States.

C. L. Woodbury, for the Claimants.

COMMONWEALTH OF MASSACHUSETTS.

Supreme Judicial Court.—Suffolk.

CATHERINE WALL, ADM'X. *v.* PROVIDENT INSTITUTION FOR SAVINGS.

The Court found as facts, that Michael Wall, the intestate, having returned from California in debt, deposited with defendants the amount of money claimed, making the deposit "in trust for Margaret Wall;" that this was in fraud of creditors and to prevent attachments; that he took the usual deposit book from the bank and gave it into the hands of one Thomas Powers, with orders to keep it for him, Michael, and that if he should die to give it to Margaret Wall. Powers kept the book several weeks, and delivered it to Margaret about a week after intestate's death. The plaintiff took out letters of administration, and with them went to defendants and asked for the money. The treasurer of the bank informed her that Margaret had been there with the bank-book, and demanded the money for herself. Plaintiff further informed the defendants that Michael's estate was insolvent; that she had no other funds to pay debts with; that intestate owed one J. H. for money loaned before the deposit. Other than the information given by the plaintiff to the defendants after Michael's decease, they had no notice of any insolvency, debts, or intended frauds, on the part of Michael. The original book of deposit was at the hearing, before the Court of Probate, but was not in the possession of the bank. The court ruled upon these facts that the plaintiff was not entitled to recover, and she excepted.

Exceptions sustained. Rescript. "This case differs from the case presented in 3 *Allen*, 96, in the fact which now appears, that the fund in controversy is needed by the plaintiff for the payment of the debts of the intestate, and the rule requiring the production of the deposit book, which was fraudulently transferred by the intestate to defraud his creditors, has no application to her suing in their right."

Wm. L. Burt for plaintiff; *Wm. S. Dexter* for defendants.

HIRAM WHITMAN ET AL. *v.* BOSTON AND MAINE R.R. CO.

This was a claim for damages alleged to have been sustained by the location of the defendants' railway over a portion of the plaintiffs' land at the corner of Haverhill and Causeway Streets, Boston.

For the purpose of showing the value of the land and the ease-

ments in the lands, the petitioners called a witness, Calvin Young, who testified he occupied a lot situated 150 feet below petitioners' wharf on the canal, from 1840 to 1845; that he hired it and paid rent for it; that he used the canal as others did; that he heard of sales of land on canal about time of location of railroad, but not from buyer or seller; that he had no knowledge of any sales, and had never bought or sold and had never owned land on the canal. The petitioners proposed to ask this witness the value of the land, and the value of the easement in the canal. The defendants objected, and the court refused to permit the question to be put. To this exclusion the petitioners excepted.

The defendants called one Sargent, who testified that he was principal assessor of Boston, was first chosen in 1844, and had been in office ever since; that he assessed this land for 1844; that he did not know when he first saw it, but it was not till after the canal was filled up opposite it; that he never knew how the petitioners used the canal, and did not know what their rights in canal were. Had known of sales of land on Haverhill Street, but not on canal; had assessed other wharf property on canal, and in other parts of the city; had never been engaged in any business which required the use of a wharf, in any part of the city. The defendants then asked the witness what in his opinion the land was worth at the time of the defendants' location of their road. The petitioners objected that he was not qualified to give his opinion as an expert, but the witness was permitted to give his opinion. To this admission the petitioners excepted.

The defendants also introduced one Cowdin, who testified he was dealer in marble, and owned a lot of land on Charlestown Street, 100 to 150 feet from the canal, and 800 feet from the petitioners' lot; that his lot was not on the canal or any other water, or used for wharfing purposes; that he was well acquainted with petitioners' wharf and the canal, and had known how it was used for thirty-five years; that he had heard of sales of land on the canal to the defendants, just before their location, and the prices paid from parties to the sales, and had used wharfs in other parts of the city, for the purpose of receiving on them stone to be used in his business. The defendants then asked the witness the value of the petitioners' land. Objected to, admitted, and exceptions taken.

The petitioners also claimed that the remainder of their lot was injured by the location of the defendants' road so near to it, and one of the petitioners was called to show it. Upon cross examination, the respondents asked the witness for what price the remainder of the petitioners' lot was sold. The petitioners objected to this question, as the sale was not made till 1861, but the court allowed it to be put, and the petitioners excepted.

Rescript. Exceptions sustained. "The rulings of the court rejecting the testimony of Calvin Young were erroneous, and for this reason the exceptions are sustained.

The rulings of the court upon the other points, and as respects the other witnesses, were correct."

J. G. Abbott and *H. C. Hutchins* for petitioners; *B. F. Thomas* and *C. P. Judd* for respondents.

FREDERIC W. SAWYER *v.* PAWNERS' BANK.

An action to recover for plaintiffs services as president of said bank.

The court found, upon the evidence, that the plaintiff had been active and influential in obtaining the charter of the bank, and putting it into operation; that the bank was organized in October, 1859; went into operation January 1, 1860; that in October, 1859, plaintiff was duly chosen president for one year, and again in the autumn of 1860, for another year; that he had stated to some of the directors that he should make no charge for his services as president for the first year, nor up to January 1, 1861, but that if he remained president after then he should expect compensation; that he had an account for professional services as an attorney, covering the whole time during which he was president, which account was allowed and paid by the directors before this suit was begun; that said account, for the time for which compensation is sought in this suit, amounted to $244; that in January, 1861, at a regular meeting of the board of directors, the plaintiff stated that he should expect a reasonable compensation for his services as president after January 1, 1861; that this statement was heard by two of the seven directors, but no reply made thereto; that in July of that year he filed in the bank his bill for two quarters' salary, at the rate of $100 per month, together with separate bills for professional services performed in 1860 and 1861; that in September, 1861, the subject of his claims for salary was referred by the directors to the stockholders, by their vote, and subsequently referred back to the directors; that no other action was ever taken either by the directors or the stockholders upon the subject of his claims for compensation for his services as president.

Upon these facts the defendants claimed that this action could not be maintained. The plaintiff contended that under the pleadings, the plaintiff was entitled to recover the amount claimed in his declaration, if anything, and was not obliged to prove the value of his services; but the court ruled otherwise.

The defendants objected to the introduction of evidence to show the value of services, on the ground that it was immaterial what

those services were reasonably worth; and contended that though it might be shown that those services were of some value, yet the plaintiff could not recover unless he went further, and showed that the directors had fixed some compensation for those services. The court, however, did hear testimony, and found a value for the services. But the court found that there was no evidence that the board of directors had ever, by vote or in any manner, fixed or made any compensation to the plaintiff for his services as president, and ruled as matter of law, in the absence of such evidence, that the plaintiff could not recover said sum, or any sum, in this action, and directed judgment for the defendants. Plaintiff excepted. Exceptions overruled, and judgment of the Superior Court for defendants affirmed.

Rescript. "Upon the facts proved at the trial, and which are stated in the bill of exceptions, there was no implied promise on the part of the defendants to pay the plaintiff for his services as president of the bank; and as there was no vote of the directors that he should be paid, and no express promise of the defendants to pay him, he cannot recover anything in this action."

H. C. Hutchins for plaintiff; *Geo. O. Shattuck* and *John C. Ropes* for defendants.

Samuel A. Way *v.* Calvin and Nahum Reed.

An action of contract to recover damages for the breach of certain covenants in a lease to said Calvin as lessee, and Nahum as surety for him. The lease was duly executed, as were certain papers on the back thereof, which papers were,—A, an assignment of the lease by Calvin to one Kingsbury; B, an agreement with Way by Kingsbury, for consideration, to perform all the covenants of the lease; and C, an agreement on the part of sureties to be responsible for Kingsbury's rent. But said papers were executed without the knowledge or assent of Nahum, or of any one authorized to act for him, and were not known to him until after Kingsbury was in actual occupation of the premises. Lease dated April 20, 1860. Kingsbury occupied from December 1, 1860, to May 10, 1861. During his occupancy he paid rent to the plaintiff, which was accepted by him, but such payments were not sufficient to pay the whole rent named in the lease. On May 8, 1861, rent being in arrears, and the plaintiff having previously notified Kingsbury and his sureties thereof, procured from Kingsbury papers D, an agreement to perform the condition of the lease, and E, an assignment of the furniture, &c.; and on May 10, 1861, entered upon the premises and took possession of them for breaches of the covenants of the lease, and afterwards the plaintiff incurred expenses

for cleaning and repairs, and let and received rent for the premises.

The rent, up to December 1, 1860, was paid by Calvin. There was no agreement made or intended to be made by the plaintiff, to cancel or annul the lease, or to release any of the parties to the lease or the assignment, unless as matter of law the papers A, B, and C, amounted to such release or agreement.

Kingsbury, about February 1, 1861, erected a bar in one of the rooms of the premises, and thereafter openly and publicly sold intoxicating liquor contrary to law, but this was done without the knowledge of the plaintiff, who did not discover the fact till about May 1, 1861, when he forbade Kingsbury, and he thereupon ceased to sell. The plaintiff's agent, Hunter, employed to collect rents and generally oversee his tenements and report to him if anything was to be done about them, knew that liquor was so sold by Kingsbury soon after he commenced selling, but did not report the fact to plaintiff. The character of the house, it appeared, had been injured by the manner in which it had been kept by Kingsbury.

The parties conceded that it was the intention and understanding of all the parties that Nahum Reed should be liable only as surety on the lease, and that the plaintiff had so treated him in all acts relating to the matter after the making of the lease.

The defendant, Nahum Reed, contended that he was liable on the lease only as surety, and that the facts, acts, and doings of the plaintiff above stated, in law, worked an extinguishment of, and discharged him from his liability as surety. He also claimed that he was not liable on the lease, for the following reasons, among others: viz., that the agreement between Calvin and Way, to permit Kingsbury to occupy the premises, without the assent of this defendant, was a material alteration of the original lease; that Kingsbury's occupation of the premises without this defendant's assent, but in accordance with the agreement of Way and Calvin, was a violation of the terms of the original lease; that the covenants not to lease, let, or permit any other person to occupy the premises, would restrict the right of occupation to the original lessee, unless all the parties to the lease assent to or permit the occupation of some other party; that Calvin and the lessor, under the terms of the lease, were not authorized to assign the lease and put another party in possession with this defendant's assent; that the papers A, B, and C, taken together, are not merely an assignment of the interest of the lessee, but amount to a new contract of lease, and substitution of a new lessee and sureties, but upon the same terms for the original lessees and sureties; that the legal effect of the three agreements was to create a new contract of lease between Way and Kingsbury, as lessor and lessee, and Williams and Grant, as sureties for Kingsbury, and therefore worked an

extinguishment or release of Nahum Reed's liability as surety for the original lessee; that this defendant being liable only as surety on the original lease, is entitled to show that a person who occupied the premises with the lessor's consent, put in without the knowledge of this defendant, used the premises for the illegal sale of spirituous liquors; that if it appears that such occupant did use the premises for that purpose, openly and notoriously, and in such a manner as to be generally known to the public, the original lease is void as against this defendant as surety, whether the lessor had actual knowledge of it or not; that if the agent of the plaintiff authorized to collect this rent, and having a general supervision of the premises, knew that such occupant did use the premises for such purposes, then that knowledge would be sufficient to hold the plaintiff, and the lease would therefore be void as against this defendant; that the manner in which the plaintiff entered the premises, amounted to an eviction in law of the original lessee, and worked an extinguishment of the defendant's liability as surety; and that the defendant, if liable at all, was not liable for the cleaning and repairs.

The court ruled otherwise, and found that Nahum Reed was liable as surety, and for the plaintiff, for the balance of rent due at date of writ, and for such reasonable charges incurred by plaintiff, as he had proved for cleaning and repairing the premises after he entered for breach of the conditions of the lease.

The lease was in part printed, the words lessor and lessee being in the singular number; but the word lessee was in all cases changed by pen to lessees, and the covenants, &c. were to be performed by the said "Reed's."

The defendants exceptions were overruled. Rescript.

1. No question is open on the pleadings; no objection thereto having been taken at the trial.

2. Nahum Reed was liable as lessee.

3. His liability as lessee was neither extinguished nor discharged by the acts and doings of the plaintiff and Calvin Reed in relation to the demised premises, which were proved at the trial.

4. The agreement between Calvin Reed and plaintiff to permit Kingsbury to occupy the premises, did not release or discharge the defendant Nahum Reed from his liability under the lease.

5. The condition by which it is stipulated that the estate is not to be underlet, or the lease assigned without the lessor's written assent, is intended solely for the benefit of the lessor.

6. The entry of the plaintiff, and the eviction of Kingsbury, and the subsequent occupation of the premises by persons to whom the estate was let by the lessor, did not discharge said Nahum from his liability.

7. The said Nahum, by the terms of the lease, is liable for reason-

able charges incurred in cleaning the premises, and repairing the same.

8. The use of the premises for the sale of intoxicating liquors under the circumstances proved at the trial, constituted no defence to this action.

R. M. Morse, Jr., for plaintiff; *Edward Avery* for defendant.

GEORGE T. LANCASTER AND OTHERS, Petitioners, *v.* GEORGE F. CHOATE ET AL.

This was a petition to the Supreme Judicial Court, under General Statutes, ch. 118, § 16, to revise proceedings in Insolvency, instituted before Hon. Geo. F. Choate, Judge of Insolvency for Essex County. Briefly stated, the facts are as follows: —

G. T. Lancaster and B. P. Woodman have been partners in the business of manufacturing shoes, at Haverhill, for many years. For the latter part of the time the firm name has been "Woodman & Lancaster;" — originally it was "B. P. Woodman & Co." In April 1856, Mr. W. R. Whittier, of Haverhill, became a special partner in the firm of Woodman & Lancaster, and paid in ten thousand dollars as his share of the capital. All the requirements of the statute were followed, in regard to certificates, registration, publication, &c. This special partnership was to continue, by the terms of the contract between the parties, for three years.

In April 1859, a certificate of the renewal of such special partnership for three years longer, was published in the Haverhill papers, but no record was made of it, and the statute provisions were confessedly not complied with.

In the fall of 1861, Woodman & Lancaster stopped payment, and suits were commenced against them. November 4th, 1861, two petitions were presented to the Judge of Insolvency, one by Lancaster, in which he alleged that the firm, consisting of himself, Woodman and Whittier, were insolvent, and desired to take the benefit of the Insolvent Laws; the other by Woodman, in which he represented the firm to be insolvent, but alleged it to consist only of himself and Lancaster. Notice of Lancaster's petition was ordered to be given to Whittier, and a hearing was had on both petitions on Saturday, Nov. 9th.

It was there made to appear that the special partnership existed, that the certificate of renewal was published, but not acknowledged nor recorded, and that Whittier had, since April 1859, in two or three instances represented himself as a special partner. Lancaster testified that Whittier was actually a partner, and interested in the business. He (Whittier) claimed, and offered evidence to show that, as a fact, he had not been a partner, as between himself and

the firm, since April 1859, when all his capital, as such, was withdrawn; — that since that date, he had had no interest in the business of the firm, either in profit or loss; — and that his only connection with them had arisen from the fact of his endorsing their paper very largely for their accommodation.

Upon the evidence, the judge found that Whittier had not in fact been a partner, either general or special, after April 1859; that a mere holding out as a special partner, would not make him such partner as to authorize proceedings in insolvency, whatever might be the effect upon his relations with individual creditors; and thereupon he dismissed the petition of Lancaster, and ordered a warrant to be issued upon the petition of Woodman.

Before the time appointed for the first meeting of Woodman and Lancaster's creditors, this petition was filed by Lancaster and the firm of Bucknam, Rayner & Co., creditors of W. & L., against the Judge of Insolvency, the messenger, Whittier and Woodman. The prayer was for an injunction against the proceedings instituted by Woodman, for a mandamus, or other proper process, requiring the judge to proceed upon the petition of Lancaster, and for other incidental and general relief. A temporary injunction was ordered, and the respondents were called upon to answer summarily, which they did, two of them also filing demurrers. The cause came on to be heard in the first instance before *Hoar* J., by whom, with the consent of parties, it was referred to C. H. Hill, Esq., as a commissioner to hear and report evidence to the court. Evidence was thereupon taken at very great length before the commissioner, principally upon the question of fact whether Whittier was actually a partner after April 1859. Upon the coming in of the report, the cause was reserved by the Chief Justice for the whole court upon the petition, answers, demurrers and evidence.

The case was argued before the full Bench in February 1863.

The questions of law which were raised and argued, were substantially these:

1. Whether the court had power to issue a mandamus to an inferior tribunal, requiring him to decide any question pending before him, according to the dictates of any judgment but his own; the respondents contending that the only province of a mandamus to a judicial officer is to require him to exercise his judgment, and not to dictate the result to which he shall come.

2. Whether the court has power, either by way of mandamus, or otherwise, to revise the decision of the Judge of Insolvency on questions of fact, decided by him upon conflicting testimony, and in which he was necessarily called upon to pass upon the credibility of witnesses.

3. As involved in the last question, whether the court, in passing upon the evidence, could properly consider any testimony except

that which was introduced before the Judge of Insolvency, or whether they would consider new testimony introduced for the first time at the hearing in this court, the respondents claiming that a clear distinction exists between an appeal, which vacates the judgment appealed from, and opens the whole case, and a collateral proceeding to revise or correct, which only operates upon so much as is erroneous and needs revision.

4. The questions arising as to Whittier's liability to be proceeded against, upon one or the other view of the evidence and facts, and particularly whether, assuming him to have been shown to be a special partner, the provisions of the statutes (Gen. St. ch. 55, § 6,) would be so construed that the failure to record a certificate of renewal would make him liable to be proceeded against in insolvency, by one of the general partners, or merely relate to the rights of creditors.

The questions of fact were also very fully discussed by counsel.

* * * * * * *

The following decree and rescript were sent down. "Decree to be entered vacating the proceedings upon the petition of Woodman, and making the injunction perpetual, and commanding the said Choate to proceed upon the petition of Lancaster against the said Woodman, Lancaster & Whittier, as insolvent debtors."

1. "This court has jurisdiction to revise and correct the proceedings of Courts of Insolvency in respect to the matters complained of, as well in matters of fact, as in matters of law.

2. Whittier made himself liable to be proceeded against in Insolvency by his copartners as a general partner, because he did not comply with the provisions of the Rev. Stats., chap. 34, relating to special partnerships.

3. Upon the evidence in the case the decision of the Judge of Insolvency was erroneous."

B. F. Brooks and *H. Carter*, for complainants; *Edw. Avery* and *S. B. Ives, Jr.*, for respondents.

RECENT ENGLISH CASES.

Peek *v.* The North Staffordshire Railway Company.

(House of Lords.)

Action against the defendants as common carriers, for negligence in carrying marble chimney-pieces. The defendants pleaded that the goods were delivered by the plaintiff, and received by the defendants, subject to a special contract, whereby

the defendants were not to be responsible for loss or injury to them unless declared and insured according to their value, and that the same were not so declared and insured. Plaintiff was the owner of the chimney-pieces, and directed M. to forward them to London. On the 12th of June, 1857, notice was delivered to M., stating, among other things, that defendants "would not be answerable for loss or injury to marbles, unless declared and insured according to their value." M. sent the chimney-pieces to defendants' office, with a verbal inquiry as to what the insurance would be, to which defendants sent a written answer to the effect that the amount of the insurance depended on the value of the articles, and requesting in turn to know the value. M. thereupon wrote to ask the rate of premium. On the 16th of July defendants wrote to M., saying, among other things, "It is necessary, before fixing the rate of insurance, that we should perfectly understand the nature and amount of risk we are about to undertake, and I will lose no time in getting the rate of insurance fixed when you oblige me with the information." Subsequently verbal messages passed between the parties prior to the 1st of August, and defendants' clerk stated as the result, that he would not forward the goods unless he had written orders as to the amount for which the goods were to be insured, if insured, stating the rates for insured and uninsured goods. No intimation was given by M. as to the amount for which the goods were to be insured; and on the 1st of August M. wrote to the defendants: "Please forward the goods uninsured, directed to," &c. Signed, "C. Meigh, for W. G. Whittingham." The goods were accordingly sent off, and the charge made as for uninsured goods. The goods were injured on their journey. The Court of Exchequer Chamber held, on the above facts, reversing the judgment of the Queen's Bench (*Williams J., dissentiente*), that there was a special contract signed by the plaintiff, or the person delivering the goods for carriage, within the meaning of the 4th proviso in the 7th section of the 17 & 18 Vict. c. 31, the Railway and Canal Traffic Act, which limited the liability of the defendants; also, that the letter of the 1st of August, and the forwarding of the chimney-pieces by the defendants upon the terms proposed in it, was a special contract within the 6th section of 11 Geo. 4, and 1 Will. 4, c. 68 (the Carriers' Act); also, that the letter of the 1st of August might be read, first, with the light cast upon it by the Carriers' Act; secondly, by that of other letters and facts stated in the case; and thirdly, simply by itself; and that in either of these cases it constituted a contract for the carriage of the marble upon the terms that defendants should be free of risk.

On appeal, the decision reported 8 W. R. 364, was reversed.

Under the 7th section of the Railway and Canal Traffic Act, the 17 & 18 Vict. c. 31, no general notice given by a railway company would be valid in law for the purpose of limiting the common law liability of the company as carriers.

The common law liability may be limited by such conditions as the court or judge may determine to be just and reasonable, but such conditions must be embodied in a special contract in writing, signed by both parties.

The above condition, even if it had been embodied in a special contract, would be neither just nor reasonable. The words "not insured," in the letter of the 1st of August, 1857, did not refer to the written condition, or afford any ground upon which the written condition could be regarded as incorporated with the letter.

In order to embody in the letter any other document or memorandum, so as to make it part of the special contract contained in that letter, the letter must either have set out the writing referred to, or clearly referred to it, that by force of the reference the writing itself would become part of the instrument.

This was an appeal by the plaintiff from a decision of the Exchequer Chamber (reported 8 W. R. 364), reversing a judgment of the Queen's Bench (reported 6 W. R. 797, where the facts will be found fully detailed).

The following learned judges were present to assist the House:—The Lord Chief Justice, the Lord Chief Baron, Mr. Justice Wil-

liams, Mr. Baron Martin, Mr. Justice Crompton, Mr. Justice Willes, and Mr. Justice Blackburn.

J. Gordon Allan and *H. James* appeared for the appellant.

Phipson Q. C., for the respondent.

At the conclusion of the arguments the following questions were submitted to the learned judges:—

First—Is the condition, that the company should not be responsible for injury to the goods (that is, the marbles), unless the same were declared and insured according to their value, a just and reasonable condition within the true intent and meaning of the 17 & 18 Vict. c. 31, s. 7?

Secondly—Is the plaintiff entitled to have the verdict entered for him upon the fourth plea?

Thirdly—Is the plaintiff entitled to have the verdict entered for him upon the fifth plea?

COCKBURN C. J., and CROMPTON and BLACKBURN JJ., answered the first question in the negative and the others in the affirmative.

POLLOCK C. B., MARTIN B., and WILLES J., answered the first question in the affirmative and the others in the negative.

WILLIAMS J., answered all three questions in the affirmative.

The LORD CHANCELLOR.—This is a question of great interest to the community at large, and of special importance to the railway companies. We are much indebted to the learned judges for the elaborate opinions which they have given in this case. I regret that those opinions are much at variance with one another. I attribute that difference of opinion to the conflicting decisions upon this subject; but, with deference, I cannot think that there is in the matter itself any very serious difficulty. The question depends entirely, or almost entirely, upon the construction to be given to the 7th section of the Railway and Canal Traffic Act, passed in 1854. I concur entirely with the interpretation put upon that section by Jervis C. J., in the case of *Simmons* v. *The Great Western Railway Company*, 18 C. B. 813. I think that the true construction of that section may be expressed in a few words. I take it to be equivalent to a simple enactment that no general notice given by a railway company shall be valid in law for the purpose of limiting the common law liability of the company as carriers. Such common law liability may be limited by such conditions as the court or judge shall determine to be just and reasonable; but with this proviso, that any such condition so limiting the liability of the company shall be embodied in a special contract in writing between the company and the owner or person delivering the goods to the company, and which contract in writing shall be signed by such owner or person. It is true that the section is expressed in a confused manner; but those conclusions, I think, are plainly deducible from the cumbrous language which is there employed. The points, therefore,

which arise in the present case are, first, is the condition on which the company in the present appeal rests its defence a just and reasonable condition? Now, it is important, in the first place, to observe, that not only does the section of the Act of Parliament to which I have referred declare that the general conditions shall be invalid so far as they seek to affect the common law liability of a railway company as carriers, but the words expressly state that any condition having for its object to relieve a company from liability occasioned by the neglect or default of such company shall be null and void. Now, if the present condition were embodied in a contract between the company and the owner of the goods delivered to be carried by that company, the necessary effect of such a contract would be, that it would exempt the company from responsibility for injury, however caused, including, therefore, negligence and even fraud or dishonesty on the part of the servants of the company. For the condition is expressed without any limitation or exception. I am therefore, in the first place, clearly of opinion that the conditiou insisted upon by the company, even if it had been duly embodied in a special contract between the parties to the appeal, is a condition which it would have been the duty of a court or judge to hold to be neither just nor reasonable. The effect, therefore, of this view of the case would be, that the plaintiff Peek in the court below would be entitled to a verdict upon the fifth plea, for the fifth plea depends entirely upon the averment that the condition was just and reasonable. But it is not only necessary that the condition should be just and reasonable, but it is also necessary, as I have already observed, that it should be embodied in a special contract in writing, signed by the owner of the goods, or the person delivering the goods. And the second question that arises (although in truth the first point would dispose of the whole case) is, whether there does exist in this case any special contract in writing embodying the condition signed by the owner of the goods or the person delivering the goods? It is insisted by the company that that requisition of the statute is answered and fulfilled by the letter of the 1st of August, 1857. It is contended by the company that the words which are found in that letter, "not insured," do refer to and incorporate the condition. I am clearly of opinion that there is no foundatiou for that contention on their part, and I am also of opinion that it is not competent by any description or parol evidence so to interpret the words "not insured" as to embody or incorporate the condition itself into the letter, and thereby make it a special contract in writing. Such special contract in writing, signed by the party delivering the goods, must itself either in terms or by distinct reference set out or embody the condition in question. But I am of opinion that those words "not insured" do not refer to the written condition, or afford any

ground upon which the written condition can be regarded as incorporated with the letter. In order to embody in the letter any other document or memorandum or instrument in writing, so as to make it part of a special contract contained in that letter, the letter must either set out the writing referred to, or so clearly and definitely refer to the writing, that by force of the reference the writing itself becomes part of the instrument it refers to. I am therefore of opinion that, even if the condition had been just and reasonable, there would not be found in the present case any special contract in writing sufficient to answer the exigency of the 7th section; and I should therefore have been of opinion that in the action below the plaintiff Peek was entitled to a verdict on the fifth plea. On every ground, therefore, I humbly submit to your Lordships that the judgment of the Court of Exchequer Chamber is wrong, and that the plaintiff is entitled to a verdict upon the fourth and fifth pleas in the action.

Lord CRANWORTH and Lord WENSLEYDALE concurred.

Lord CHELMSFORD stated his regret that he could not agree with their Lordships in the view they had taken of the case; but if he was in error, he had the satisfaction of knowing that that error was countenanced by many judges of eminence. His Lordship thought that where two parties entered into a binding contract, a judge had not the power to say, although they were willing to be bound, he should release them from their contract, because he did not consider it just or reasonable. In his opinion it was not unreasonable that the railway company should demand extra payment for the extra risk they ran in conveying goods of so fragile a nature as marble; but, of course, notwithstanding such contract, they would have been responsible for any damage accruing through the negligence of their servants. He thought the judgment of the court below ought to be affirmed.

BUCKLEY *v.* GROSS.—(*Queen's Bench.*)

The plaintiff purchased melted tallow which had flowed from a wharf on fire, into the river, where it was picked up by a waterman, from whom he bought. The tallow was afterwards seized by the police pending an inquiry before a magistrate, and by his order, they sold it to the defendant.

Held, that the plaintiff was not entitled to recover it from defendant, and that the latter could set up the title to the tallow thus derived from the police, although the original owners had not claimed.

Trover, for fat and tallow melted and mixed together.

Pleas, not guilty, and not possessed. At the trial before Blackburn J., at Guildhall, it appeared that on the occasion of a large fire at some wharfs on the River Thames, at the end of June, 1861, great quantities of fat and tallow, there deposited, were melted,

and flowed into the river, mixed up together; and that a waterman had picked up a quantity of it as it floated down the river, and on the 1st of July, early in the morning, sold some of it—upwards of a ton—to the plaintiff for £10.

It was put by the plaintiff in his bags, and was being conveyed away in his cart from the place where it was bought—Horsleydown Stairs—when, immediately after leaving that place, it was seized by the police, and the plaintiff was taken into custody, and brought before the magistrate, who, however, without waiting to hear the case, discharged him, but ordered the tallow to be detained, and the police sold the fat to the defendant, who carried it away in the plaintiff's bags, notwithstanding the plaintiff demanded it of him. The plaintiff being examined, stated that he did not know where the fat came from, and did not know how the waterman got it, but thought it was some of the tallow floating about. The learned judge, on this evidence, left to the jury only the question of value (which they assessed at £12), and directed them to find for the defendant, reserving the point whether the plaintiff was entitled to the tallow as against the police or those claiming under them. A rule had been obtained on the part of the plaintiff, to enter the verdict for him.

It being taken as a fact that the plaintiff knew that the tallow came from bonded warehouses at the wharf, and had floated through the sewers into the Thames, a rule *nisi* to enter the verdict for the plaintiff had accordingly been granted.

M. Chambers Q. C., and *Barnard*, for the defendant, showed cause.—The plaintiff was a wrong-doer, for he took from one whom he knew to be a wrong-doer, and who had no right to take and keep the tallow. It belonged either to the original owners, or the wharfinger, or the insurers. At all events the plaintiff had a mere bare possession, and no right or title: Addison on Torts, p. 195; Roscoe's Nisi Prius, p. 609. And under the London Police Act 2 & 3 Vict. c. 71, s. 30, the order of the magistrate, and the sale by the police under his authority, vested the right in the defendant, at all events, as against all the world but the original owners. [*Blackburn J.*—It may be taken as a fact (although no formal evidence was given of it) that the police held the money, the proceeds of the sale, for the wharfingers or the insurers: it cannot be presumed that the police kept the money, but there is no evidence that the owners have ratified the sale. It may also be taken that there was a charge of felony against the plaintiff, so as to bring the case within the London Police Act.]

Robinson and *Finlason*, for the plaintiff, in support of the rule.—The plaintiff was the true owner. He was far more than a mere finder; he had bought from one who had acquired the property, by the title of occupation, or first reduction into possession after dereliction or abandonment by the original owners: Bracton, Lib.

ii., c. 1; Lib. iii., De Corona, 120; 2 Blackst. Comm. (ed. by Coleridge), p. 13. That being so, the magistrate had no jurisdiction under the London Police Act. And even as a wrong-doer the plaintiff's title was good as against all the world but the true owner; *Rackham* v. *Jessup*, 3 Wil. 332, 338. Moreover, by confusion of substance, the property was lost to the original owners, and their only remedy was in equity: *Jones* v. *Moore*, 4 Y. & C. Eq. Ex. 352. The first finder, then, was the owner, and the plaintiff, who bought from him, had all the rights of his vendor. The order of the magistrate, then, was made without jurisdiction, and the sale was utterly wrongful and void. [*Cockburn C. J.*—There is not sufficient evidence that this was tallow belonging to different owners to cause the question of confusion of substance. And as to the plaintiff being the owner, he knew where the tallow came from.] Still it was lost to the owners unless he recovered it, for it was drifting down to the sea. It was not a mere case of finding. It was acquisition of title by occupancy.

Cockburn C. J.—No doubt a person who has possession of a chattel may maintain an action of trover against any one who takes it from him, as a wrong-doer. But here the defendant does not derive title from any one who, as against the plaintiff, was a wrong-doer. The plaintiff was charged with feloniously stealing the tallow, and the magistrate had jurisdiction under the Police Act to make the order which he did, to detain the tallow. And it must be presumed that the police sold it under an order from him. Whether, however, they were warranted in so selling is, as between these parties, immaterial. For the plaintiff had nothing but a bare naked possession, which, no doubt, is sufficient, as against a wrong-doer, but which was taken out of him by the prior order of the magistrates to detain the tallow. There was thus an entire separation between the plaintiff's possession and the act of the defendant in taking possession under the authority of the police. And the plaintiff, therefore, as against the defendant, cannot enforce a possessory right, and cannot sustain this action.

Crompton J.—It is clearly established that possession alone is sufficient to maintain trover or trespass against a wrong-doer—*i. e.*, a person who takes the chattel from the person having possession of it. In this case the plaintiff was in no better position than a mere finder, and his possession was lawfully divested out of him, and the defendant had a possession at the time of the conversion, not derived from the plaintiff. The possessory right cannot be carried further than to sustain an action against any one wrongfully taking the chattel out of the plaintiff's possession. Here the possession of the plaintiff had been interrupted and divested, before the defendant had possession.

Blackburn J.—The wharfinger had a special property in the tallow, so that, even if there was a difficulty in dividing it among

the different owners, there could not, on that account, be any right of property in the finder derived from confusion of substance; nor does any such conclusion follow from the case cited: *Jones* v. *Moore*. Neither was the tallow derelict or abandoned by the owner or the wharfinger. The plaintiff, therefore, had only a possessory right; and even if not a wrong-doer, his possessory right, such as it was, had been lawfully divested by the order of the magistrates to detain the tallow, and the defendant had afterwards acquired it from the police. At common law (*Lawrence* v. *Hedger*, 3 Taunt. 14) the police were justified in arresting the plaintiff on suspicion of felony; and the finder, knowing where the tallow came from, was bound to hold it for the wharfinger, as the true owner. The police, therefore, would be justified in taking it and holding it; and certainly, under the Police Act, the magistrate had jurisdiction to make the order to detain it. The plaintiff's possession, therefore, was wrongful, and even if not, was rightfully divested prior to the defendant's obtaining possession. That being so, the action could not be maintained, and therefore

Rule discharged.

TOPPIN *v.* HEALEY.—(*Common Pleas.*)

Principal and Agent—Commission—Revocation of Authority—Breach of Contract.

The defendant employed the plaintiff to negotiate a loan on some of the defendant's property, plaintiff to be paid commission if he procured the loan, but none if he did not. Before the plaintiff had done anything in the matter, the defendant wrote to him, varying the terms on which he would accept the loan. The plaintiff endeavored to obtain it on the latter terms, but failing to do so, obtained an offer for a loan on the terms of the first authority, which the defendant refused to accept.

Held, that as the first authority had been revoked, the plaintiff was not entitled to commission for what he had done, neither was he entitled to claim for his services in endeavoring to procure the loan under the substituted terms, inasmuch as he did not obtain it under those terms.

Held, also, that the plaintiff might have treated the revocation of the first terms of his employment as a breach of contract, and have had his action thereon against the defendant.

BUCKLAND *v.* GIBBINS.—(*Lord Chancellor.*)

Injunction—Lessor and Lessee—Improper Exercise of Legal Right.

The court will grant an injunction to restrain the exercise of a legal right, which is sought to be enforced for a sinister and inequitable purpose.

Accordingly, where a judgment had been obtained by an underlessor, in an action of ejectment, against an underlessee, to recover possession of leasehold property, the term of which had almost expired when the action was commenced, and had determined before the judgment could be obtained, and a writ of *habere* was about to be issued—it appearing that the object of the plaintiff at law was by obtaining possession to secure a lease from the freeholder to himself in pursuance of an alleged agreement, and to defeat the right which he knew the underlessee had to a lease of the same property under a prior and independent agreement with the freeholder—

Held by the Lord Chancellor, reversing the decision of the Master of the Rolls, that the underlessee was entitled to an injunction to restrain the issuing of the writ.

NEWTON *v.* CUBITT.—(*Exchequer.*)

Ferry—Disturbance—Evasion.

In an action for carrying in the line of a ferry, and for carrying near thereto for the purpose of evading it, it appeared that in a deed of conveyance in 1676, the ferry was called Potter's Ferry, and described as "all that ferry extending from a place or marsh called the Isle of Dogs, over the Thames, unto the town of Greenwich," and was granted in as ample a manner as the same had theretofore been enjoyed. On the island there was formerly but one highway leading to Potter's Ferry Stairs; but since 1800 the spot had become thickly inhabited, and several new roads had been made communicating with the highway. The ferry complained of had been established at a point 1280 yards distant from Potter's Ferry, which was the only place where the plaintiffs had ever kept men and boats.

Held (affirming the judgment of the Common Pleas), that the limits of the ferry must be ascertained from user, and that by user the plaintiffs' ferry was limited to the line from Potter's Ferry Stairs to the town of Greenwich, and did not extend to all parts of the Isle of Dogs, and that the defendants had not carried in that line.

Held, also, that in ascertaining whether the defendants had carried near to the line of the plaintiffs' ferry for the purpose of evading it, the change of circumstances since the original grant might be taken into account, and that the defendants had not infringed any right of the plaintiffs.

A grant of ferry is generally from the point where a highway reaches the water's edge to a point on the opposite bank or to a vill, and a grant from all parts of a named area to a place or vill is anomalous.

PEARSON *v.* SPENCER.

Way of Necessity—Implied Grant—Disposition by Will of two Tenements—Easement—Severance.

A testator, the owner of two contiguous farms, one of which was occupied by a tenant, and the other by the testator, devised the farm occupied by the tenant to his son A., and the other farm to his son J. The farm devised to A. was inaccessible from the highway, except by a road lying across the farm devised to J., which was used by the tenant up to the testator's death. The enjoyment of A.'s farm in the state in which it was when devised, was not complete without this road; but though convenient, such road was not a way of necessity. The will made no mention of ways.

Held, that by implication, the road, as used at the time of the testator's death, passed to A. under the devise, and not merely a way of necessity.

Semble, that a way of necessity is limited by the necessity, and terminates at that point where the shortest approach to the land terminates.

THE SUN IN THE QUEEN'S BENCH.[1]

AN ACTION AT LAW.

Tried before the LORD CHIEF JUSTICE BIGWIGGINS. *And familiar to the student of legal literature as the Case of* IKEY *versus* LARKINS.

THIS was an action for libel. The offence consisted in the publication of a portrait of the plaintiff, to which were appended certain defamatory expressions.

Mr. Bangham, Q. C., and Mr. Boggles appeared for the plaintiff; the defendant's case was conducted by Mr. Terrier and Mr. Worrit.

Mr. Bangham, in a pathetic speech, described the enormity of the injury which had been inflicted on his client by the insidious attempt of the defendant to deprive him of his good name. Insidious it might well be called, for instead of attacking the plaintiff openly and straight-forwardly, the defendant had, in the most un-English manner, attempted to traduce him by means of a portrait, which could not be mistaken for any other person's—being a photograph. He had basely sought to blacken the plaintiff's character by the perversion of light. He had dared to make the Sun an accomplice in this deed of darkness. The sorcerers of the Middle Ages thrust

[1] *Reported by Punch.*

daggers into the effigy of the object of their malice, with the intent to destroy his life. In like manner the defendant had tried to stab the plaintiff's reputation. This atrocious act was prompted by vindictive feeling. The plaintiff was a gentleman of capital, which he was in the habit of devoting to the accommodation of parties in difficult circumstances, for no other worldly consideration than a moderate per centage. He had had occasion to institute legal proceedings against the defendant. The latter had attempted to revenge himself by means of this wicked libel, for which he (the learned counsel) looked for damages commensurate with the wrong which his client had sustained, to the indignant feelings of a British jury.

The libel was here produced in court, occasioning great laughter. It was one of many with which the town had been placarded. The sun-picture was that of an old gentleman with a large hooked nose, and an expression of countenance which perhaps a physiognomist would consider an ample justification of the words which were subjoined to it. These were printed in large letters and constituted a libel of the following simple and elementary form:

"HERE YOU BEHOLD THE OLD STOLEN BILL-DISCOUNTER,
ROGUE, THIEF, AND SWINDLER,
AS HE APPEARED PERJURING HIMSELF IN THE
WITNESS-BOX."

The learned gentleman then called—

Mr. Samuel Ikey, the plaintiff, whose appearance excited much merriment, owing to the exactness of the correspondence of his countenance with the picture. Believed the description under the photograph to be meant for himself.

Cross-examined by Mr. Worrit:—Had brought an action against defendant for £100, on a bill of exchange, which defendant alleged to have been stolen. Had obtained a verdict.

Mr. John Jones, photographic artist. Took a portrait of plaintiff. The photograph produced was that portrait, or a copy of it. Was employed to take the photograph by defendant. Made several copies for defendant.

Mr. Williams Wilkins, printer, of the firm Wilkins and Watkins, had printed a number of handbills. That produced was one of them. Had been engaged to print them by defendant.

This was the plaintiff's case.

Mr. Terrier, in an eloquent appeal to the jury, strongly denounced the plaintiff as a perjured and dishonest miscreant and villain. He contended that, in the first place, the words in question were not libellous. They related to a mere shadow, and not to any individual person. In the next place, even supposing the

words and picture together constituted a libel—which he denied—there was no proof, nor any attempt at proof, of publication. The jury would not be humbugged by the fudge of his learned friend. He trusted they would scout this trumpery and groundless action out of Court. It was a mere dodge to extort money got up by the plaintiff's attorney.

The learned Judge summed up. His Lordship said it was quite appalling to think of the facilities afforded by photography for defamation of character. To write ill names under anybody's likeness was in effect the same as writing them on his back. However, they must confine themselves to the law of the case. Now, to call a man a thief or a swindler was no doubt libellous, but a picture was not a man. It was certainly not a libellous act to take, or cause to be taken, a photographic portrait; neither could it be said to be libellous to procure the printing of the words, swindler and thief. If the law were so, then Dr. Johnson's *Dictionary*, which contained the word thief, would be a libellous publication. If the jury thought that the picture and the plaintiff were the same thing, then they would come to the conclusion that the words beneath it constituted a libel; but if they considered that a person differed from a thing, they would come to an opposite conclusion. It was shown that the defendant had procured the photograph to be taken, and the bill to be printed, and his learned brother naturally wished them to put this and that together. But the question was, did the defendant put the photograph and bill together? If they thought that proved by the evidence, which no evidence had been called to prove, and if they considered the bill and photograph together to constitute a libel, as he had said before, they would find for the plaintiff; but if otherwise, why then, of course, their verdict must be for the defendant.

The jury, after a short deliberation, returned a verdict for the defendant.

The Lord Chief Justice said the action must have failed in any form; but he wondered it had not been brought in that of conspiracy. The bill-sticker would then have been one of the defendants. *(Laughter.)*

Mr. Worritt, "And the Sun, my Lud." *(Great Laughter.)*

Mr. Boggles. "We should rather have had the Sun in the witness-box." *(Roars of laughter, in which the* Lord Judge *heartily joined.)*

Mr. Terrier. "Would you have subpœnaed the Sun?" *(Increased laughter.)*

The Lord Chief Justice. "Then the Sun would have come down upon you with the fiery face he has." *(Tremendous laughter.)*

Mr. Terrier. "Those laugh who win." *(Renewed laughter.)*

The verdict appeared to give great satisfaction to a crowded Court.